LAW REPORTS OF TRIALS OF WAR CRIMINALS

Selected and prepared by

THE UNITED NATIONS WAR CRIMES COMMISSION

ENGLISH EDITION

VOLUME III

LONDON

PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
BY HIS MAJESTY'S STATIONERY OFFICE

1948

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CONTENTS

PAGE

FOREWORD BY THE RT. HON. THE LORD WRIGHT OF DURLEY .. ix

THE CASES:

11. TRIAL OF KRIMINALASSISTENT KARL-HANS HERMANN KLINGE

Eidsivating Lagmannsrett and the Supreme Court of Norway, 8th December, 1945, and 27th February, 1946 1

A. OUTLINE OF THE PROCEEDINGS

1. THE HISTORY OF THE CASE 1
2. COMPOSITION OF THE SUPREME COURT 2
3. THE CASE FOR THE DEFENCE 2
4. THE JUDGMENT OF THE COURT 2
   (i) Judge Skau 3
   (ii) Judge Holmboe 6
   (iii) Judge Bonnevie 10
   (iv) Judge Schjelderup 10
   (v) Judge Larssen 10
   (vi) Judge Alten 11
   (vii) Remaining Judgments 11

B. NOTES ON THE CASE

1. THE OFFENCE ALLEGED 12
2. THE QUESTION OF THE RETROACTIVE APPLICATION OF THE DECREE OF 4TH MAY, 1945 13
3. THE DEFENCE THAT THE DEATH SENTENCE WAS NOT JUSTIFIED EVEN ACCORDING TO THE PROVISIONAL DECREE 14

12. TRIAL OF KRIMINALSEKRETÄR RICHARD WILHELM HERMANN BRUNS AND TWO OTHERS

Eidsivating Lagmannsrett and the Supreme Court of Norway 20th March and 3rd July, 1946 15

A. OUTLINE OF THE PROCEEDINGS

1. THE INDICTMENT 15
2. THE EVIDENCE PROVED BEFORE THE LAGMANNSRETT .. 16
3. THE DECISION OF THE LAGMANNSRETT 16
4. THE APPEAL TO THE SUPREME COURT 19
5. THE DECISION OF THE SUPREME COURT 19

PAGE

B. NOTES ON THE CASE

1. THE OFFENCES ALLEGED 20
2. THE LEGAL STATUS OF THE NORWEGIAN UNDERGROUND MILITARY ORGANISATION AND THE QUESTION OF REPRISALS 21
3. THE LEGALITY OF SHOOTING A PRISONER WHILE TRYING TO ESCAPE 22
4. SUPERIOR ORDERS AND DURESS 22

13. TRIAL OF ROBERT WAGNER AND SIX OTHERS

French Permanent Military Tribunal, Strasbourg and Court of Appeal
23rd April—3rd May and 24th July, 1946 .. 23

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT 23
2. THE ACCUSED 24
3. THE INDICTMENT 24
(i) Position and Powers of the Accused 24
(ii) Nature of the Offences Charged 27
I. RECRUITMENT OF FRENCH NATIONALS FOR THE GERMAN ARMY 27
(*a*) The Recruitment of Volunteers 27
(*b*) Military Conscription 28
II. MURDER AND COMPLICITY IN MURDER 30
(*a*) Judicial Murders 30
(*b*) The Murder of four Allied Airmen 32
(*c*) Murders Committed in Prisons and Concentration Camps 33
III. OFFENCES COMMITTED AGAINST THE LIBERTY OF THE INDIVIDUAL 34
(i) Compulsory Labour Service 34
(ii) Expulsion from Alsace 34
(iii) Deportation to Germany 34
4. THE EVIDENCE BEFORE THE COURT 35
5. PLEAS OF THE DEFENCE 36
(i) Plea to the Jurisdiction of the Court 36
(ii) Plea Relating to the Status of Alsace 36
(iii) The Plea of Superior Orders 38
(iv) The Challenge of Wagner's Counsel to the legality of applying the Ordinance of 28th August, 1944 .. 38
6. PROGRESS OF THE TRIAL 38

PAGE

A. OUTLINE OF THE PROCEEDINGS—*continued*

7. THE QUESTIONS EXAMINED BY THE TRIBUNAL AND THE VERDICT 40
8. THE SENTENCE 42
9. RECOURSE TO AND DECISIONS OF THE COURT OF APPEAL (*Cour de Cassation*) 42
(i) The Composition of the Military Tribunal 42
(ii) Four Pleas Based upon Alleged Infringements of the Procedural Rights of the Accused 43
(iii) The Alleged Retroactive Application of the Ordinance of 28th August, 1944 44
(iv) The Status of Alsace 45
(v) A Plea Based on the Fact that the Judges were not asked whether the Acts charged were Justified by the Laws and Customs of War 45
(vi) Five Pleas relating to the Application of Provisions of French Law regarding Enrolments on Behalf of an Enemy Power, and relating to Superior Orders .. 46
(vii) The Jurisdiction of the Military Tribunal 47
(viii) The General Outcome of the Appeal 49

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE TRIBUNAL AND ITS JURISDICTION.. 49
2. PRISONERS OF WAR RIGHTS NOT GRANTED TO PERSONS ACCUSED OF WAR CRIMES 50
3. THE CHARGES AGAINST THE ACCUSED 50
4. THE DEFENCE OF SUPERIOR ORDERS 54

14. **TRIAL OF GUNTHER THIELE AND GEORG STEINERT**

United States Military Commission, Augsburg, Germany 13th June, 1945 56

A. OUTLINE OF THE PROCEEDINGS

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE COMMISSION.. 56
2. CONFIRMATION OF SENTENCES 57
3. THE LEGAL NATURE OF THE OFFENCE 57
4. THE DEFENCE OF SUPERIOR ORDERS 58
5. THE DEFENCE OF MILITARY NECESSITY 58

PAGE

15. TRIAL OF PETER BACK

United States Military Commission, Ahrweiler, Germany
16th June, 1945 60

A. OUTLINE OF THE PROCEEDINGS

B. NOTES ON THE CASE

1. LEGAL BASIS OF THE COMMISSION 60
2. THE NATURE OF THE OFFENCE 60
3. MADNESS AS A DEFENCE 61

16. TRIAL OF ALBERT BURY AND WILHELM HAFNER

United States Military Commission, Freising, Germany
15th July, 1945 62

A. OUTLINE OF THE PROCEEDINGS

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE COMMISSION 62
2. RULES OF PROCEDURE 62
3. THE NATURE OF THE OFFENCE 63
4. THE DEFENCE OF SUPERIOR ORDERS 64

17 and 18. TRIALS OF ANTON SCHOSSER AND OF JOSEF GOLDBRUNNER AND ALFONS JACOB WILM

United States Military Commissions at Dachau
14th-15th and 17th September, 1945 65

A. OUTLINE OF THE PROCEEDINGS

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE COMMISSIONS 65
2. THE SEVERANCE OF TRIALS 66

PAGE

19. TRIAL OF ERICH KILLINGER AND FOUR OTHERS

British Military Court, Wuppertal
26th November—3rd December, 1945 67

A. OUTLINE OF THE PROCEEDINGS

B. NOTES ON THE CASE

1. The Legal Basis of the Charge 67
2. De Minimis Non Curat Lex 70
3. The Scope of Regulation 8 (i) of the Royal Warrant.. 70
4. The Relative Value of Affidavit Evidence 71
5. Statements may be put in without Proof of Voluntary Nature 71
6. Significance of Affidavit Evidence in Relation to Rules of Procedure 40 (C) and 41 (A) 72
7. Possibility of a Second Re-examination of Witnesses .. 73
8. Right of Counsel to Call Himself as Witness 74
9. Witnesses Allowed Written Memory Aids 74
10. The Question of Translations of Evidence 74

20. TRIAL OF YAMAMOTO CHUSABURO

British Military Court, Kuala Lumpur
30th January—1st February, 1946 76

A. OUTLINE OF THE PROCEEDINGS

B. NOTES ON THE CASE

1. The Nature of the Crime Alleged 76
2. The Defences of Drunkenness, Self Defence, Superior Orders, Provocation and Alleged Loss of Civilian Status by the Victim 77

ANNEX I.—Norwegian Law Concerning Trials of War Criminals 81

ANNEX II.—French Law Concerning Trials of War Criminals by Military Tribunals and by Military Government Courts in the French Zone of Germany 93

ANNEX III.—United States Law and Practice Concerning Trials of War Criminals by Military Commissions, Military Government Courts and Military Tribunals 103

FOREWORD

This third volume includes reports of ten cases. They are drawn from widely distant parts of the globe ; the trial courts are diverse in character, consisting of National Courts and Military Courts acting under different warrants or commissions. The charges were diversified in character.

Perhaps the most important case from the standpoint of international law is that which stands first in the volume. The prisoner was a German named Klinge. He was indicted before a Norwegian Court for torturing Norwegian civilians, and in one case so as to cause the victim's death. The trial court sentenced him to death under Articles of the Civil Criminal Code as modified by a Provisional Decree of 1945, which gave new and special powers to the Court in the case of war crimes, including the power to impose the death sentence where under the relevant articles of the Civil Criminal Code imprisonment was the severest penalty. On appeal, the sentence was upheld by the Supreme Court ; nine of the thirteen judges affirmed the decision of the trial judges, four dissented. The question was whether the Decree of 1945, which was passed after the crime was committed and which first gave the Court power to sentence to death for the offence, had retrospective effect, notwithstanding Article 97 of the Constitution of Norway, which is in the following terms : " No law may be given retroactive effect " and Article 96 which vetoed any trial except according to Norwegian law, as follows : " No one may be convicted except according to law, or be punished except according to judicial sentence. Examination by torture must not take place." As the actual crime was covered by the specific penal prohibitions of the Norwegian Civil Criminal Code, no question of retroactive operation arose as to the conviction, but it did arise as to the sentence. The Law of 1945 was clearly, it was held, intended to have a retroactive effect in permitting the death sentence. The majority of the Court held that the particular classes of offences against the laws and customs of war depended on rules of international law and lay outside the intended scope of Article 97 of the Constitution. These were directly binding on the prisoner as from the outbreak of war and by international law his crimes could be punished by the death sentence. The majority fully accepted that Sections 96 and 97 were constitutional limitations binding on both the Norwegian legislature and Courts, but were of the opinion that the laws and customs of war were incorporated into Norwegian Law and punishable by the penalty described by International Law for the offence, namely death. The minority were of opinion that Section 96 was obligatory and meant by " law " law in the sense of formal laws or regulations passed by the

Norwegian legislature and that Section 97 excluded the retroactive effect of the law of 1945 which, in their opinion, first legalised the death penalty for the crime.

I may, perhaps, be pardoned for giving a reference to an article which I contributed to the Fall Issue of the Toronto Students' Journal, " Obiter Dicta." At p. 20 I have referred to the rule against retroactive law as a principle of justice, not jurisdiction, quoting the judgment of the International Military Court at Nuremberg, and also quoting a valuable statement of principle by Willes J. in the English case of Phillip *v.* Eyre, that there may be cases which the existing law for want of prevision fails to meet, so that to refuse the intended retroactive effect of the remedial law may involve such injustice that the maxim *summum jus summa injuria* would apply. But beyond that, the objection had also to be considered under Article 96 that the law being applied was not the ordinary penal law only of the nation such as is contemplated by Article 96, but a special law, namely, international law, and that the international law and customs of war had been incorporated into Norwegian law. This latter involves the meaning of law in Section 96. If I may refer again to my article, on p. 19, I contemplated the possible jurisdiction of a national Court to administer not only the ordinary national law, but also the international law, such as that of Prize and of the laws and customs of war. The Norwegian Court has thus, in treating the Court as a Court of international law as well as of national law, decided a question which did not arise for direct decision by the Nuremberg Tribunal.

The next case recorded in the volume is also from the Norwegian Supreme Court. It is the case of Richard Wilhelm Hermann Bruns and two others. Charges of murder there failed. As to the charges of torturing, the Supreme Court held that the inflicting of torture was a serious war crime, and though it did not result in death or permanent disability, might justify the death sentence. This decision followed the decision of the Supreme Court on these questions of retroactive operation which I have just referred to. The Court did not find it necessary to consider the defence advanced that the torturing was justified by way of reprisal. No doubt the true import of the theory of reprisals forms one of the most important and difficult questions which now face the student of the law of war. But it is difficult to regard with anything but distaste the suggestion that torture can be justified as a reprisal against inhabitants of an occupied country for their acts in working with the underground movement. It is, however, technically inadmissible on many grounds.

The case next reported comes from the Permanent Military Tribunal at Strasbourg and the French Court of Appeal. The chief defendant was the ex-Gauleiter of Alsace ; the main question was whether the Germans had conquered the province or were merely in occupation until the time came when it was freed by the Allies. Once that was decided against the defendants, the numerous consequential questions were not difficult to decide, though the decisions are important. They are too complicated to be set out in this Foreword. They are examined in the Report as fully and precisely as is possible. But the clear decision that recruiting Alsatians to serve in the German army was contrary to the laws of war, having regard to the status of Alsace, will be a leading case on the point.

The other cases reported in this volume are from Allied Military Courts, five from Military Commissions set up by the United States in Germany, one from a British Military Court in Germany, and one from a British Military Court sitting at Kuala Lumpur in the Malay Peninsula. They were all concerned with the murder or maltreatment of prisoners of war or civilians and with breaches of the Geneva Convention, and also the Hague Convention No. IV of 1907. They all involve subsidiary points of interest. It is curious to find in war crimes cases such defences as that the killing was done on the spur of the moment, or was done by the prisoner when insane or under the influence of drink, or in self-defence, or under provocation. These defences, after being carefully considered, failed. There were also some interesting defences of a technical character which the reader of the Reports should consider in detail.

This volume has been prepared by Mr. George Brand, LL.B., of the Commission's legal staff, under the supervision of the Legal Publications Committee, composed of Mr. Kintner (United States), Chairman, Dr. Schram Nielsen (Denmark), and Mr. Aars-Rynning (Norway). The outlining of the Norwegian cases is based on reports submitted to the Commission by Mr. Aars-Rynning, who has also assisted in drafting the Annex on Norwegian Law.

WRIGHT,
Chairman,
United Nations War Crimes Commission.

London, *January*, 1948.

CASE No. 11

Trial of Kriminalassistent KARL-HANS HERMANN KLINGE

EIDSIVATING LAGMANNSRETT AND SUPREME COURT OF NORWAY, 8TH DECEMBER, 1945, AND 27TH FEBRUARY, 1946

Torturing and Ill-treatment of Civilians as a War Crime. The Validity under Article 97 of the Norwegian Constitution of the Retroactive Application of the Provisional Decree of 4th May, 1945, on the Punishment of Foreign War Criminals.

A. OUTLINE OF THE PROCEEDINGS

1. THE HISTORY OF THE CASE

The case against Karl-Hans Hermann Klinge was in the first instance tried by the Eidsivating Lagmannsrett (one of the five Norwegian courts of appeal). On 15th October, 1945, Klinge was charged by the Director of Public Prosecutions with having committed war crimes which violated:

(i) Art. 228 of the Civil Criminal Code, with which should be read Art. 3 of the Provisional Decree of 4th May, 1945,[1] by having ill-treated at the end of February or the beginning of March, 1945, a named Norwegian citizen during interrogations at the Gestapo H.Q. in Oslo.

(ii) Art. 229 of the Civil Criminal Code, with which should be read Art. 232 thereof and the Provisional Decree of 4th May, 1945, by having ill-treated and tortured 17 Norwegian citizens whom he interrogated at the Gestapo H.Q. in Oslo during the period from November, 1944, to the end of April, 1945.

It was proved that the victim named in the first charge was forced to bend his knees for a very long time, was then beaten with a truncheon across his back and his seat, and was finally stripped and, with his hands and feet bound, was thrown into a bath filled with ice-cold water, where he was repeatedly ducked under. As a result of this ill-treatment he collapsed and died on the same day.

The evidence also showed that the 17 victims referred to in the second charge were tortured by being beaten with a special heavy truncheon, and being hit in the face, and were given cold baths. During the interrogation " Wadenklemmen " and handcuffs were used.

The Lagmannsrett was satisfied with the evidence as to the defendant's guilt, and, on the 8th December, 1945, sentenced Klinge to death for having committed crimes against Arts. 228 and 229 of the Civil Criminal Code, and Art. 3 (*a*), (*b*) and (*c*) and Art. 1 of the Provisional Decree of 4th May, 1945. The case then went on appeal to the Supreme Court of Norway.

[1] Regarding the Norwegian Law concerning trials of war criminals, *see* Annex I on pp. 81-92.

2. COMPOSITION OF THE SUPREME COURT

As the case against Karl-Hans Hermann Klinge was regarded as a leading case, all the 13 judges of the Supreme Court took part in the hearing, as laid down by Art. 2 of Law No. 2 of 25th June, 1926. The judges were : Skau, Holmboe, Bonnevie, Schjelderup, Larssen, Alten, Grette, Evensen, Stang, Fougner, Berger, Bahr and Berg.

The Public Prosecutor was Statsadvokat Harald Sund. Counsel for the Defence was Høyesterettsadvokat Adam Hjorth.

3. THE CASE FOR THE DEFENCE (1)

Counsel for the Defence argued that the Lagmannsrett had unjustly applied the Provisional Decree of 4th May, 1945 ; as the crimes for which the defendant had been convicted had been committed before the passing of that Decree, the punishment should have been restricted to the limits set by Arts. 228, 229 and 62 of the Civil Criminal Code. Norwegian law did not provide for a more severe punishment than those laid down in these provisions. The Provisional Decree of 4th May, 1945, which provided for severer penalties, could not be applied, as such a course would be at variance with Art. 97 of the Constitution, which stated that : " No law may be given retroactive effect." International law recognised the death sentence, but international law could not give authority for the application of a more severe degree of punishment without having first been formally incorporated into Norwegian national law. The defending counsel pointed out that it had been commonly accepted in Norwegian legal theory and legal practice that the veto imposed by Art. 97 was absolute as far as criminal law was concerned.

It could not be said that the situation had been confused, because the King and his Government in London had had every opportunity of keeping the criminal law legislation up to date ; Counsel here made reference to the Provisional Decree of 22nd January, 1942, which had amended Chapters 19, 21 and 22 of the Civil Criminal Code.

Another point raised by the defending counsel was that the same Provisional Decree of 1942 did not introduce the death sentence for crimes against Arts. 228 and 229, and that it was only the Provisional Decree of 4th May, 1945, that made possible the infliction of a death sentence for crimes against the above-mentioned paragraphs. Thus the defendant's crimes had been judged more severely than would have been the case if the Provisional Decree of 1942 had been applied.

A subsidiary appeal was lodged against the extent of punishment ; according to the defending counsel, the sentence was too severe even if the Provisional Decree of 4th May, 1945, could be applied.

4. THE JUDGMENT OF THE COURT

The decision of the Lagmannsrett was upheld by nine of the judges of the High Court, with four judges dissenting. The judgments are summarised below.

(1) As no records are kept of the proceedings of such trials as the present, this statement of the case for the defence has been made up of passages from the judgments delivered.

(i) *Judge Skau*

Judge Skau was the first judge to give reasons in favour of upholding the sentence passed by the Lagmannsrett. He said that the crucial question for the court to decide was whether the provisions of Art. 97 of the Constitution had to be regarded as precluding the retroactive application of the Provisional Decree of 4th May, 1945. It appeared from the Decree itself and its explanatory memorandum that it was intended that the former be given retroactive effect.

Judge Skau fully realised the force of the argument of defence counsel in favour of keeping to a strict interpretation of Art. 97, and he agreed that an extraordinary situation did not in itself justify or authorise any modification of that provision ; on the contrary, it was in extraordinary situations that the provision had its most important purpose to fulfill. In his opinion, nevertheless, there was no question of a conflict with Art. 97 in the case in hand, which must be regarded as lying outside the intended scope of Art. 97. Before setting forth his reasons, however, Judge Skau made some preliminary observations.

The defendant had been convicted for a series of grave acts of torture. Torture, said Judge Skau, was not only criminal according to Norwegian law ; it was also a violation of the laws and customs of war. According to the same laws and customs of war, war crimes could be punished by the most severe penalties, including the death sentence. In other words the criminal character of the acts dealt with in the case in hand as well as the degree of punishment were already laid down in these provisions of international law relating to the laws and customs of war. Those provisions were valid for Norway as a belligerent country.

Judge Skau did not consider it necessary to deal with the question whether Norwegian courts were precluded by Art. 96 of the Constitution (" No one may be convicted except according to law. . . .") from trying war criminals in accordance, directly and solely, with the above-mentioned provisions of international law. It had to be regarded as conclusive that such a legal bar had been removed by the passing of the Provisional Decree of 4th May, 1945. That Decree had incorporated the provisions of international law regarding war crimes into Norwegian law as an integral part of the national legislation as far as it was considered necessary by the Norwegian legislature.

Even if it were granted that Norwegian courts could not have inflicted a more severe punishment than was provided for by Norwegian law had the Provisional Degree of 1945 not been passed, foreign war criminals tried in Norway would not have been sentenced for acts which were not criminal at the time when they were committed, nor would they have been given a more severe sentence than was provided for by international law in force at the time. It was beyond doubt that the acts in question were not only crimes according to Norwegian law but also war crimes, crimes against the " laws of humanity " and the " laws and customs of war." He particularly wanted to stress the international character of the trial and punishment of war criminals as distinct from the trial of the quislings of the various nations.

The late President Roosevelt and Mr. Churchill had declared, on 25th October, 1941, that the disposal of war criminals was one of the main

war aims of the Allies. A solemn statement on the punishment of war criminals had been made on 31st January, 1942, in the St. James's Declaration by the governments of those Allied countries whose territories had been occupied by the Axis Powers, and the Moscow Declaration of 1st November, 1943, voiced the same views. Judge Skau then recalled the preparatory work carried out by the United Nations War Crimes Commission for the trial of war criminals, and the conventions which had been adopted by the Allied nations setting out how the various nations should take part in the prosecution of war criminals.

In view of all these declarations, he agreed with the ruling of the Lagmannsrett that in the present case there could be no question of an unconstitutional retroactive application of the Provisional Decree of 4th May, 1945. The passing of that Decree was a link in or a result of Norway's adherence to the agreements between the Allied nations mentioned earlier. The claim of the Allied belligerent nations, including Norway, to exercise the right to punish war criminals became effective the moment their crimes were committed, this right being based on and circumscribed by the provisions of international law regarding the laws and customs of war.

The real effect of the Decree was merely to authorise the Norwegian courts to make effective the already existing demand for punishment in conformity with the conventions concluded.

Art. 97 of the Constitution was one of the means of safeguarding citizens against an unjustified infringement by the state of their constitutional rights. Judge Skau agreed with the defending counsel that these protective provisions had been made not only in the interest of the individual citizen but also and primarily in the interest of the community. The arbitrariness and uncertainty which would be caused by an unlimited right to give new laws a retroactive effect would prejudice the most vital interests of the community.

It seemed unreasonable, however, to maintain that provisions made for the protection of the community could be pleaded by foreign intruders, citizens of a state which had attacked that same community in order to subdue it, who had used the most reckless and brutal means to achieve this end. Such a situation could not possibly have been foreseen by those who drafted the Constitution. To allow such a plea by foreign war criminals would be a violation of the high principles which were the foundation of Art. 97 and the claim for justice which it supported.

Judge Skau dismissed as irrelevant the argument that, since the King and his Government in London had had every opportunity of keeping the criminal law legislation up to date, it could not be claimed that the situation had been confused.

Turning to the point raised by the defending counsel, that the Provisional Decree of 1942 did not introduce the death sentence for crimes against Arts. 228 and 229, Judge Skau said that no explanation had been submitted as to why the provisions laid down by the Provisional Decree of 1945 had not been passed into law at an earlier date. He drew the court's attention, however, to the fact that the Provisional Decree of 1945, besides introducing more severe degrees of punishment than that of 1942, had set out the very

characteristics of crimes of the kind dealt with in the case in hand, defining them as war crimes and as crimes which were punishable according to Norwegian laws if they were provided against by Norwegian penal clauses. In Judge Skau's opinion it would have been formally more correct to charge and sentence the defendant for crimes against the Provisional Decree of 1945, reference also being made to Arts. 228 and 229 of the Civil Criminal Code, instead of for crimes against Arts. 228 and 229, reference also being made to the Provisional Decree of 1945. As he had pointed out earlier, the Provisional Decree of 1945 had incorporated into Norwegian national law the provisions on war crimes and their punishment laid down by international law. It was to be assumed that the date of the passing of the Decree had depended on the negotiations which had taken place between the Allied nations regarding the disposal of war criminals. It was not merely an expression of an altered and more severe attitude towards the war crimes dealt with.

Further, he wanted to point out that most probably very few outside the circle of victims who had been directly exposed to the atrocities had a complete idea or knowledge of the character and extent of the Gestapo's criminal methods before these were finally revealed. He was sure that if the Norwegian people could have foreseen at the beginning of the war that the Gestapo would act as they had done, the general and unanimous sense of justice would already then have demanded the same severe judgment of those war crimes as did the Provisional Decree of 1945. He did not agree with what had been said in the explanatory notes to the Traitors' Decree, referred to by the defending counsel, to the effect that in the circumstances prevailing during the war, the country being occupied, and the King and his Government abroad, and the Storting and the Supreme Court out of function, " it has not been possible to keep the national criminal legislation in step with the demands of justice developed in the nation in the war years." It was wrong in his opinion to interpret the quotation as meaning that the Norwegian people's sense of justice had changed during the years of war. It would be more correct to say that the people's sense of justice had not been given an opportunity to express itself before the atrocious character of those crimes was revealed.

In his opinion there was no contradiction between the conclusion which he had reached in the present case and the rulings given by the Supreme Court in cases against traitors when the question of the retroactivity of the various Provisional Decrees had been discussed and decided upon. In this connection he drew the court's attention to the interpretation, given in a recent case against a traitor, by the first judge, who had said : " In my opinion Art. 97 of the Constitution vetos a new law introducing punishment for acts which before its promulgation were regarded as lawful. In principle it also vetos the introduction of more severe punishment for such acts." In making the reservation constituted by the expression " in principle," the judge had apparently not wanted to commit himself as to the question whether an increase in punishment introduced by a new Decree would, in all instances, be at variance with Art. 97 of the Constitution. And when it had been stressed in theory that Art. 97 had imposed an absolute veto as regards criminal law, it was, no doubt, because circumstances like those with which they were being faced could not have been foreseen.

Having come to the conclusion that the application of the Provisional Decree of 1945 was not, in the present case, at variance with the Constitution, he then proceeded to consider the appeal as far as the degree of punishment was concerned.

Judge Skau agreed with the Lagmannsrett that the death sentence was the only possible punishment in the case in hand. There was no justification for a mitigation of punishment even if Art. 5 of the Provisional Decree of 1945 (regarding superior orders) were pleaded, as the Lagmannsrett had been satisfied that the defendant had acted on his own accord though with the connivance of his superiors. The defending counsel had stressed the exhorbitant pressure exercised by the Nazi system on the German people and the fact that subordinates were intentionally misled as to the lawfulness of the Nazi methods. In that connection Judge Skau pointed out that the acts of ill-treatment of which the defendant had been found guilty were such severe violations of the " laws of humanity " that he, the defendant, regardless of all German propaganda, could not have been in doubt that his acts, irrespective of their purpose, not only were to be condemned morally but were also unlawful.

(ii) *Judge Holmboe*

Judge Holmboe was the first judge to give his reasons for dissenting. He said that in his opinion there was no justification for the application of the more severe punishment introduced by Art. 3, para. 2, of the Provisional Decree of 1945, as all the crimes proved against Klinge had been committed before the promulgation of that Decree. He agreed with Judge Skau that the Decree had been intended to have retroactive effect, though the intention had not been expressly laid down in the Decree itself. The explanation for that omission could most probably be found in the following quotation from its explanatory notes :

> " International law asserts that violations of the laws and customs of war are crimes and are punishable as such. In other words, the authority to prosecute has been sanctioned by international law and comes into effect as soon as a state of war exists. As a result there is no question of retroactivity in this respect, even though the regulations of the national penal code applicable to war crimes may have been promulgated after the crime was committed."

Judge Holmboe said that he could not accept that argument, which had also been put forward by the Lagmannsrett and given further consideration by Judge Skau. In his opinion, Art. 96 of the Constitution vetoed any trial except according to Norwegian law, i.e., according to formal laws or regulations passed by the legislature. It made no difference if there existed corresponding provisions sanctioned by international law which could be applied by international bodies or, as mentioned in the explanatory notes, by the national courts of those countries whose laws admitted the infliction of punishment without special reference to law. The Judge referred to the following passage in the explanatory notes :

> " Such an interpretation is alien to the Norwegian conception of law. Norwegian courts can only inflict punishment according to provisions of Norwegian civil or military law. The principle laid down in Art. 96 of the Constitution must be interpreted in this connection so as to make

an arbitrary application of an undefined provision of international law inadmissible. In Norway, international law is not incorporated into national law as an integral part, as is the case in various foreign legal systems. Before a rule of substantial character of international law can be applied by Norwegian courts, it must be incorporated into Norwegian national law by a special act."

Judge Holmboe fully agreed with that point of view and only wanted to add that the laws regarding criminal procedure in cases of crimes against the civil criminal code, as well as for crimes against the military criminal code, expressly laid down that the indictment, in describing the criminal acts alleged, should emphasise the characteristics contained in the relevant provisions and make reference to the paragraphs applicable to the case. The only exception was made in charges dealt with by courts-martial, but it appeared from Art. 6 and Art. 1 of the law of procedure regarding crimes against the military criminal code that, even in courts-martial, punishment could not be inflicted except according to Norwegian law. In his opinion those provisions alone constituted a sufficient objection to arriving at a conviction on the basis only of the international law applicable to the crimes in question at the time of their perpetration.

If that was the case it would follow that Norwegian national law, when incorporating the provisions laid down by international law, would be given retroactive effect if applied to acts committed before its promulgation.

Consequently the main question in the case was whether such retroactivity would be at variance with Art. 97 of the Constitution. As had already been mentioned by Judge Skau, it had always been maintained that in Norwegian legal theory it was beyond doubt that Art. 97 had to be regarded as an absolute veto on the retroactive application of criminal law to the detriment of a defendant. That meant that Art. 97 not only vetoed the introduction of retroactive punishment for acts which were not punishable by the laws in force at the time of their perpetration—a question of no interest in the case—but also the retroactive increase in the degree of punishment. That interpretation of Art. 97 had always formed the basis of Norwegian criminal law and that was without doubt the reason why the question had not been dealt with previously by the courts. The same interpretation had also formed the basis for the Provisional Decrees passed in London during the war. The Provisional Decree of 22nd January, 1942, concerning punishment for membership in the Quisling Party, had not been given retroactive effect. The same applied to the Provisional Decrees of 3rd December, 1942, and 22nd January, 1942, which, *inter alia*, introduced capital punishment for various crimes against the Civil Criminal Code.

In Judge Holmboe's opinion, in normal circumstances the retroactive application of a law introducing capital punishment for crimes which could only be punished by imprisonment at the time of their perpetration, as in the case in hand, would have been at variance with Art. 97 of the Constitution.

The question arose whether the extraordinary conditions which followed the war and the occupation justified a more elastic interpretation of Art. 97 or, as Judge Holboe preferred to put it, whether those extraordinary conditions could, fully or to some extent, justify the disregarding of that provision altogether. The explanatory notes to the Provisional Decree of 1945,

did not deal with that point, apparently considering that the question of retroactivity in the strict sense of the word did not arise as the provisions already existed in international law ; to that point of view Judge Holmboe strongly dissented.

Summing up the arguments set out above, Judge Holmboe pointed out that there had been no constitutional obstacles preventing the criminal legislation from being kept up to date during the occupation. The Cabinet in London had all the time taken it for granted that, as long as the Storting was out of function, the King could pass the necessary laws in the form of Provisional Decrees. The Supreme Court had adopted that point of view and had accordingly enforced all Provisional Decrees regarding criminal law. He particularly wanted to stress that the very same crimes which were dealt with in the Provisional Decree of 1945 regarding the punishment of foreign war criminals had also been dealt with by the Provisional Decree of 1942, which amended Chapters 19, 21 and 22 of the civil penal code. According to its explanatory notes, the Provisional Decree of 1942 expressly aimed at covering serious crimes, such as murder, torture and grave bodily injury, committed by " the Germans and their collaborators," and it laid down that the death sentence could be applied for crimes which, according to the provisions of the Civil Criminal Code in the chapters referred to, could be punished by a life sentence. Consequently there had seemed to be no need at that time to introduce the death sentence for other crimes mentioned in the same chapters of the criminal code, including crimes for which the defendant had been convicted. After three years, a few days before the capitulation, the authorities responsible for the legislation had decided that the Provisional Decree of 1942 did not suffice and that the application of the death sentence should be extended to cover less serious crimes like the ones dealt with in the present case.

Judge Holmboe said that he realised that there might have been various difficulties in keeping the legislation up to date, as for instance trying working conditions and insufficient contact with public opinion at home. The discussions between the Allies regarding the disposal of war criminals might also have been a reason for the delay in the passing of new Decrees, but surely those difficulties could not justify the retroactive application, contrary to the Constitution, of Provisional Decrees.

One predominant intention of Art. 97 was that the criminal should be aware beforehand of the punishment which his crime involves. That, though a very important point, was not the only decisive one. It was impossible to accept the argument that German war criminals could not, according to the provisions of international law only, expect any other punishment than a death sentence in the event of Germany's losing the war. Another not less important result of Art. 97 was that the state powers, be it the legislature, the administration or the judiciary, should not be given the opportunity of arbitrarily and retroactively introducing or increasing a punishment for an act already committed. In other words, Art. 97 had to be regarded as a complement to the fundamental principle expressed in Art. 96 : " No one may be convicted except according to law." He did not agree that the case in hand had to be regarded as lying outside the field which Art. 97 was intended to cover. The Constitution and its historical models came to life during a period of wars and revolutions, at a time when terror

was not unknown, though it must be admitted that those who drafted the Constitution could not possibly have foreseen such a form of warfare as that waged by Germany during the Second World War. Art. 97 had been intended not to cover certain specified situations but to be an expression of a principle of law which according to its authors should form the basis of the legislation of a free community. One had to be wary of limiting the scope of that provision to suit an extraordinary situation. In normal times that provision was of lesser importance, in any case as far as criminal law was concerned, as it voiced only a principle which would concur with the people's sense of justice. It was in turbulent times that the provision was significant. It could be maintained that the situation with which they were faced was exactly like the one which Art. 97 was intended to cover. The sense of justice which had matured in the Norwegian people during the occupation had grown under the influence of the terror and indignation caused by the atrocities committed as well as by anxiety and grief. He did not want to make any conjectures as to whether the demand for justice, as had been maintained by Judge Skau, would have been the same before the occupation. However strongly he felt that the crimes committed against the Norwegian people should be severely punished, experience had shown that an atmosphere born of cruelty and hatred was calculated to upset a carefully considered and fair judgment.

It could be argued that the fact that international law had sanctioned the application of the death sentence for crimes of the kind dealt with in this case justified the view that the Provisional Decree of 1945 was not in itself unfair. That argument, however, could not justify its retroactive and unconstitutional application. Neither did he agree with the view put forward by Judge Skau that it would be unreasonable to accept a war criminal's plea which was based on the Norwegian Constitution. It was of decisive importance that the provision in Art. 97 contained a veto which was addressed in the first place to the legislature but at the same time also to the judges. It was a binding provision as to the way in which the administration of justice should be carried out in Norway. In effect, it constituted, of course, a safeguard for the criminal as well, regardless of the character and seriousness of the crime. The crimes they were dealing with in the case in hand were very serious indeed, but that should not prevent the defendant from being tried according to Norwegian law as laid down by the Constitution.

Judge Holmboe had consequently come to the conclusion that the application of Art. 3 of the Provisional Decree of 1945 to the present case would be at variance with the Constitution. As a result, the punishment should not have exceeded a maximum of 13 years and six months of imprisonment. He admitted that the result was not satisfactory. If it had been possible according to his conception of the law to propose a more severe form of punishment, he would have done so. He was not blind to the fact that it would hurt the people's sense of justice that foreign war criminals were to be punished by a restricted term of imprisonment only, whereas Norwegian torturers could be given death sentences. In that connection, however, it had to be remembered that the traitors were sentenced not only for torture but for treason as well. Taking the long view, however, it was no disaster if a criminal or a group of criminals were sentenced to a

more lenient punishment than the judge himself would wish to apply. On the other hand, it was of the greatest importance that the courts, when trying war criminals, should without reservation stick to the unshakeable safeguard against despotism as far as criminal law was concerned, namely the provision contained in the Constitution against the retroactivity of a new law, which represented a principle which had prevailed for generations.

He contended that the crimes should be brought directly within the Civil Criminal Code which, according to Arts. 228, 229, 232 and 62 thereof, was applicable to the case.

(iii) *Judge Bonnevie*

Judge Bonnevie also argued that the application of the Provisional Decree of 4th May, 1945, was at variance with Arts. 96 and 97 of the Constitution. In his opinion the sentence of the Lagmannsrett should consequently be annulled and the case retried by the Lagmannsrett, particularly as other provisions of the Civil Criminal Code might be considered applicable. According to those provisions, in conjunction with the Provisional Decree of 3rd October, 1941, the death sentence could in his opinion, be applied without violating Arts. 96 and 97 of the Constitution. He recalled, however, that the Director of Public Prosecutions had maintained that the crimes dealt with in the case could not be brought under the above-mentioned provisions, which was apparently the reason why the Lagmannsrett had not considered the question whether those provisions could be applied.

(iv) *Judge Schjelderup*

Judge Schjelderup agreed with Judge Skau but added that in his opinion it was sufficient and decisive that the crimes for which the defendant had been sentenced were not only a violation of Norwegian criminal law in the narrower sense but a violation of the generally accepted provisions of the laws and customs of war. Those provisions came into force as between Norway and Germany on 9th April, 1940, on the outbreak of the hostilities, and would remain in force until the final peace treaties were signed. The Provisional Decree of 1945, and particularly the already existing criminal provisions referred to in Art. 1 thereof, must not, according to his opinion, be regarded as anything but an interpretation of law already in force at the time of the promulgation of the Decree. According to the generally accepted laws and customs of war, which in his opinion were directly binding on the defendant, his acts were, at the time of their committing, crimes which could be punished by the death sentence. There was no question of applying a more severe punishment than could be inflicted at the time of the perpetration of the crimes. The laws of war with their severe maximum punishment were clear enough.

(v) *Judge Larssen*

Judge Larssen agreed with what had been said by Judge Skau and pointed out that it had been laid down by the provisions of international law that acts like those dealt with in the case in hand were war crimes and could be punished as such by the death sentence. The defendant was bound by those rules at the time of the perpetration of his crimes. That would have been quite clear if international criminal law could have been made directly applicable by the national court as was the case in some other countries.

He recalled that Judge Schjelderup had said that in his opinion such direct application of the provisions of international law could be made by Norwegian courts. So far it had, however, been commonly accepted that Art. 96 of the Constitution vetoed trials by Norwegian courts except according to Norwegian law. Judge Larssen fully endorsed that view but added that it was quite possible that the provisions of international law would have to be applied directly by the national courts. As the Provisional Decree of 1945 had incorporated the provisions of international law into Norwegian law, however, it was not necessary to discuss that question any further.

As to the question of whether the application of the Provisional Decree of 1945 to the case in hand would be at variance with Art. 97 of the Constitution, it would not be correct to discuss what the defendant's position would have been if the Civil Criminal Code only were to be applied. His guilt was determined by the fact that his acts were, at the time of their perpetration, subject to international law (i.e., they were war crimes which were punishable even by the death sentence). It would not alter his legal position even if those provisions of international law could not at that time be directly applied by Norwegian courts because of Art. 96 of the Constitution. The consequence would only have been that the trial would have had to be carried out by a special court established according to international law, as had been the case with the major war criminals. In view of the fact that the Provisional Decree of 1945 had merely incorporated the relevant provisions of international law into Norwegian law, he agreed with Judge Skau that the new terms of punishment did not place the defendant in a less favourable legal position than he was already in before the passing of that Decree. That implied that the retroactive application of that Decree was not at variance with Art. 97.

Judge Larssen then said that the consequence of the minority vote would be that the defendant would not be charged as a war criminal but would instead be charged with having violated the provisions of the Civil Criminal Code regarding bodily injury, which would mean his being charged for crimes of a quite different and far less serious character than he had actually committed. Art. 97 had in its general terms expressed a principle of justice. There would need to exist strong and decisive reasons before it would be possible to accept the minority interpretation referred to above, which would lead to a conclusion which, as Judge Holmboe also maintained, would offend the natural sense of justice. Such reasons were not present as far as he could discern.

(vi) *Judge Alten*

Judge Alten substantially agreed with Judge Skau's arguments and conclusions. He further endorsed Judge Larssen's views which, according to his opinion, were in agreement with what had been said by Judge Skau.

(vii) *Remaining Judgments*

Of the remaining seven judges, five (Grette, Evensen, Stang, Bahr and Berg) supported the majority vote, whereas two (Founger and Berger) supported the minority.

B. NOTES ON THE CASE

1. The Offence Alleged

Arts. 228, 229 and 232 of the Norwegian Civil Criminal Code, for breach of which Klinge was charged, provide as follows:

Art. 228. He who commits an act of violence against another person or in any other way inflicts bodily harm on him, or is an accomplice to such an act, will be fined or sentenced to imprisonment for a period of up to six months. If the act has resulted in some injury to body or health or considerable pain, a term of up to three years imprisonment can be inflicted and up to five years if the act resulted in death or grave injury. . . .

Art. 229. He who causes harm to another person's body or health, or puts another person into a state of helplessness, unconsciousness or any similar state, or who is an accomplice to such an act, will be punished by a term of up to three years and up to six years if the act has resulted in sickness or disability to work lasting more than two weeks, or permanent injury, and up to eight years if the act has resulted in death or considerable injury to body or health. . . .

Art. 232. If an act mentioned in Arts. 228-231 was premeditated and carried out in a particularly painful way or by means of poison or other similar substances which are highly dangerous to the health, or with a knife or other particularly dangerous instrument, a term of imprisonment must always be inflicted. Life imprisonment may be inflicted for crimes against Art. 231 carried out under the same conditions. For crimes against Arts. 228-229 the term of imprisonment fixed by those paragraphs can be increased by a term of up to three years.

There can be no doubt that Klinge's acts were also offences against the laws and usages of war, in so far as they constituted gross breaches of the duties of an occupant during wartime in territory under his control. Torture, said Judge Skau in the course of his judgment, was not only criminal according to Norwegian law; it was also a violation of the "laws of humanity" and of the "dictates of the public conscience" which were referred to in the introductory paragraphs to the Hague Regulation IV concerning land warfare,[1] and of Arts. 46 and 61 of the Geneva Convention concerning prisoners of war.[2] In the list of war crimes worked out for the Versailles Peace Conference of 1919, he added, torture was listed as crime No. III.

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[1] Judge Skau was making reference to the following passage: "Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."

[2] "Article 46. Prisoners of war shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces.

Officers, non-commissioned officers or private soldiers, prisoners of war, undergoing disciplinary punishment shall not be subjected to treatment less favourable than that prescribed, as regards the same punishment, for similar ranks in the armed forces of the detaining Power.

All forms of corporal punishment, confinement in premises not lighted by daylight and, in general, all forms of cruelty whatsoever, are prohibited.

Collective penalties for individual acts are also prohibited."

"Article 61. No prisoner of war shall be sentenced without being given the opportunity to defend himself.

No prisoner shall be compelled to admit that he is guilty of the offence of which he is accused."

2. THE QUESTION OF THE RETROACTIVE APPLICATION OF THE DECREE OF 4TH MAY, 1945

Assuming that the Ministry was speaking purely of the situation as seen from the point of view of International Law, the legal position regarding the prosecution of war criminals is stated very clearly in the following passage from the Ministry's memorandum: "International law asserts that violations of the laws and customs of war are crimes and are punishable as such. In other words, the authority to prosecute has been sanctioned by international law and comes into effect as soon as a state of war exists. As a result there is no question of punishment with retroactive effect in this respect, even though the provisions of the national criminal code applicable to war criminals may have to be promulgated after the crime was committed."

Nor is there any doubt that the sentence of death passed on Klinge was permissible under International Law. Judge Skau quoted authorities to show also that all war crimes could legally be punished with death under the laws and customs of war.

It may be added that no shadow of an objection could be raised to the sentence on the ground that it constituted an unjust use of the discretion thus permitted by International Law, since it was shown that a death had resulted from the ill-treatment meted out by the accused.

The questions argued during the trial therefore turned upon the interpretation of certain provisions of Norwegian law. It was not denied that Klinge had infringed Arts. 228, 229 and 232 of the Civil Criminal Code, but the Defence claimed that the punishment meted out should not have exceeded the provisions of Arts. 228, 229 and 62; of which the last runs as follows:

Art. 62. If several kinds of crime, each punishable by different terms of imprisonment, have been committed by the same person by one or several acts, the terms of imprisonment passed must exceed the minimum term of the gravest crime but must in no case exceed its maxium term by more than half. . . ."

This plea was not upheld by the Court.

The examination of Klinge's appeal involved the judges in an interpretation of one of the most fundamental provisions of the Norwegian constitution. It was perhaps in the circumstances inevitable therefore that interesting arguments based on principles of justice and public policy should have been raised. Thus, Judge Skau pointed out that circumstances like those facing the Court could not have been foreseen when the constitution was drafted, and expressed the opinion that it seemed unreasonable that provisions made for the protection of the community could be relied upon by an enemy of the same community. To allow such a plea to be put forward by foreign war criminals would be a violation of the high principles which were the foundation of Art. 97 and the claim for justice which it supported. Judge Holmboe, on the other hand, clearly regarded Art. 97 of the Constitution as a safeguard against despotism, whose full effect was worth preserving even if complete justice would, in consequence, not be done in the present case in so far as Klinge would be punished too leniently. Judge Larssen said that the acceptance of the view of the minority among the judges would offend the natural sense of justice.

Judge Schjelderup and Judge Larssen seem to have considered it correct to interpret the word " law " in Art. 97 as including the laws and customs of war as well as Norwegian law, in cases like the one before the Court.

3. THE DEFENCE THAT THE DEATH SENTENCE WAS NOT JUSTIFIED EVEN ACCORDING TO THE PROVISIONAL DECREE

The Defence entered a second plea, based on Art. 5 of the Provisional Decree,[1] that the sentence was too severe even if the Provisional Decree could be applied. The defending counsel stressed the exhorbitant pressure exercised by the Nazi system on the German people and the fact that subordinates were intentionally misled as to the lawfulness of the Nazi methods.

In making reference to " exhorbitant pressure " the Defence was raising the defence of necessity, while the suggestion that Klinge was deliberately led to believe that Nazi methods were legal seems to indicate that the Defence were relying also on the argument that in some circumstances superior orders may lead to such a mistake of fact as may itself be put forward as a defence. In this connection it is of interest to quote certain comments made later on Art. 5 of the proposed Law on the Punishment of Foreign War Criminals, by the Ministry of Justice and Police.[2]

> " It cannot possibly be admitted as a defence that a German soldier or policeman has ill-treated Norwegian civilians, devastated and burned Norwegian property, etc., in order to save himself from criminal or disciplinary punishment. There may, however, be important reasons for the mitigation of, or even complete exemption from, punishment. . . .
>
> " The paragraph should naturally not be taken to mean that circumstances resulting from superior orders cannot be exculpatory. If the superior order has given the subordinate justifiable reason to believe that the actual circumstances of the act were other than they were, exculpation may be the consequence."

The Supreme Court rejected this plea put forward by the Defence.

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(1) *See* p. 85.
(2) *See* p. 81.

CASE No. 12

Trial of Kriminalsekretär RICHARD WILHELM HERMANN BRUNS and two others

BY THE EIDSIVATING LAGMANNSRETT AND THE SUPREME COURT OF NORWAY, 20TH MARCH AND 3RD JULY, 1946

Torturing as a War Crime. The Legal Status of the Norwegian Underground Military Organisation. The Defences of Legitimate Reprisals, Superior Orders and Duress.

A. OUTLINE OF THE PROCEEDINGS

1. THE INDICTMENT

The accused were Kriminalsekretär Richard Wilhelm Hermann Bruns, Kriminalassistent Rudolf Theodor Adolf Schubert and Kriminaloberassistent Emil Clemens. All three were accused of the murder and torturing of Norwegian citizens.

Bruns was charged by the Director of Public Prosecutions with having committed war crimes which were in violation of:

1. Art. 233 of the Civil Criminal Code, and Art. 3 of the Provisional Decree of 4th May, 1945,
2. Art. 231 of the Civil Criminal Code, with which should be read Art. 232 ; the Provisional Decree of 4th May, 1945 ; and the Law of 6th July, 1945,
3. Arts. 228 and 229 of the Civil Criminal Code, the Provisional Decree of 4th May, 1945, and the Law of 6th July, 1945.

Schubert was charged with having committed war crimes which were in violation of:

1. Art. 229 of the Civil Criminal Code, with which should be read Art.232; and Art. 3 of the Provisional Decree of 4th May, 1945,
2. Arts. 228 and 229 of the Civil Criminal Code, and the Provisional Decree of 4th May, 1945.

Clemens was charged by the Director of Public Prosecutions with having committed war crimes which violated:

1. Art. 233 of the Civil Criminal Code, and Art. 3 of the Provisional Decree of 4th May, 1945,
2. Arts. 228 and 229 of the Civil Criminal Code, with which should be read Art. 232 ; and the Provisional Decree of 4th May, 1945.

The Public Prosecutor acting in this trial was Statsadvokat Harald Sund. Counsel for the Defence was Høyesterettsadvokat Adam Hjorth.

2. THE EVIDENCE PROVED BEFORE THE LAGMANNSRETT

The case against Bruns, Schubert and Clemens was in the first instance tried by the Eidsivating Lagmannsrett. During the trial several witnesses were called for both the prosecution and the defence. The following facts were established.

On 17th April, 1945, Bruns and Schubert went to arrest a certain Norwegian who was in charge of the arms of the illegal Military Organisation. They rang the bell at his flat and the door was opened by his brother, who slammed it as soon as he saw the Germans. When the brother refused to open in spite of orders, Schubert fired several shots with his automatic through the door. When the door finally gave in, Bruns fired some shots at random through the opening. The brother was mortally wounded and died later in hospital.

In March or April, 1943, Bruns fired from a distance of 25-30 metres at a Norwegian prisoner who was trying to escape. The shot was aimed at the prisoner's legs but, as he was stooping at that moment, he was hit in the head and killed.

On 19th December, 1942, Bruns was present at the interrogation of a sick Norwegian. Leg screws were fastened to his legs and he was beaten with various implements. Later he was thrown unconscious into a cellar, where he remained for four days before receiving medical attention. Between 1942 and 1945, Bruns used the method of " verschärfte Vernehmung " on 11 Norwegian citizens. This method involved the use of various implements of torture, cold baths and blows and kicks in the face and all over the body. Most of the prisoners suffered for a considerable time from the injuries received during those interrogations.

Between 1942 and 1945, Schubert gave 14 Norwegian prisoners " verschärfte Vernehmung," using various instruments of torture and hitting them in the face and over the body. Many of the prisoners suffered for a considerable time from the effects of injuries they received.

On 1st February, 1945, Clemens shot a second Norwegian prisoner from a distance of 1.5 metres while he was trying to escape. Between 1943 and 1945, Clemens employed the method of " verschärfte Vernehmung " on 23 Norwegian prisoners. He used various instruments of torture and cold baths. Some of the prisoners continued for a considerable time to suffer from injuries received at his hands.

3. THE DECISION OF THE LAGMANNSRETT

The Court established that both Bruns and Schubert were aware that, when firing through the door and later at random into the room, they might hit the brother. The Court also established that the wounds from which the latter died had been inflicted by Brun's pistol and Schubert's automatic. The Court found, however, that the defendants could not be held guilty of murder as they were trying to arrest a man who was in charge of the arms of the illegal Military Organisation and they had expected armed resistance.

It appeared later that the person in charge of the arms was not at home that night and that arms were never kept in the flat, but the defendants may not have known that and may have thought that they were encountering armed resistance.

The Court felt satisfied that Bruns, when trying to stop the prisoner from escaping, had aimed at his legs but that, as the victim stooped at that very moment, the shot hit him in the head. The Court came to the conclusion that, as the prisoner had not stopped when ordered to do so, the defendant had acted within his rights in shooting at him. The fugitive had been an important official in the illegal intelligence service whose capture was of great importance to the German authorities, and the only way to stop him from getting away was to shoot at him. The Court, therefore, did not consider the defendant guilty of his murder.

The Court felt it established beyond doubt that the sick Norwegian had been most brutally ill-treated, but, as it had not been possible to ascertain Bruns' part in the torture, the Court gave him the benefit of the doubt and acquitted him on that count of the indictment.

The Court found that the prisoner shot by Clemens had been trying to escape and that the defendant had not exceeded his rights in trying to prevent him from escaping by shooting at him. The Court, therefore, held the defendant not guilty of his murder.

The Court then turned to a consideration of the torture allegations. In this connection Counsel for the Defence, Høyesterettsadvokat Adam Hjorth, had claimed that the Military Organisation and its activities were at variance with International Law and that the Germans in fighting the organisation were, therefore, justified in using methods contrary to International Law. The German methods of carrying out interrogations had to be regarded as constituting reprisals.

The Court could not accept this point of view. The Military Organisation had been established in 1941, and soon had members all over the country, with its centre in Oslo. In 1945, it had more than 40,000 members. The organisation received its orders from the Norwegian High Command in England and its task was to take part in the fight for freedom and to organise acts of sabotage.

The members of the organisation, continued the Court, were instructed in the use of small arms and had courses in explosives and other means of sabotage with a view to carrying on partisan warfare. Such warfare did not take place, however, and the skirmishes which occurred between the men of the home forces and German groups were of a casual nature. It was not till the German capitulation that the Military Organisation mobilised. During the occupation its activities consisted mainly of organising, training, military intelligence and some sabotage. The members were not in uniform and bore no special marks of distinction on such occasions ; nor did they carry their weapons openly. They had, therefore, no rights as soldiers according to Article 1 of the Regulations on Land Warfare (Hague Regulations). On the other hand they had no unlawful weapons, they did not attack objectives contrary to the Hague Regulations nor did they commit any other acts at variance with the laws and customs of war. Thus their activities were permissible according to international law, but they had no rights as soldiers as long as they did not appear in uniform, did not bear marks of distinction and did not carry their arms openly. They could, therefore, be shot when caught.

In the opinion of the Court, this underground military movement did not constitute a breach of International Law and therefore the Germans were not justified in using torture against its members as a means of reprisal.

Further, the defendants has pleaded superior orders in connection with all the torture charges. In the beginning, said the Court in its judgment, only the Chief of the Sipo, Fehlis, had any right to give such orders. Later that right was extended to those under him, first to StumbannführerReinhardt, Chief of Abteilung IV, and then to Fehmer who was in charge of counter-espionage and matters concerning the Military Organisation. Bruns, who was directly responsible to Fehmer, and other Sachbearbeiters often employed torture of their own accord, though as a rule with the connivance of their superiors. The Court took it for granted that the defendants, when employing torture during interrogations in order to extort confessions or information, acted to the best of their belief in the interest of their country.

The Court could not accept the defendants' plea that they would have been in serious danger from their superiors had they refused to perform such acts of alleged duty. The Court could not believe that a state, even Nazi Germany, could force its subjects, if they were unwilling, to perform such brutal and atrocious acts as those of which the defendants were guilty. There was no doubt that the German methods were effective. Their investigations were solely based on betrayal and torture. But for these methods they would never have succeeded in interfering with the underground movement to the extent they did.

On the other hand, the Germans had omitted to try a considerable number of prisoners whom they could have sentenced to death, without infringing the laws and customs of war, for sabotage or participation in the activities of illegal organisations.

In deciding the degree of punishment, the Court found it decisive that the defendants had inflicted serious physical and mental suffering on their victims, and did not find sufficient reason for a mitigation of the punishment in accordance with the provisions laid down in Art. 5 of the Provisional Decree of 4th May, 1945.[1] The Court came to the conclusion that such acts, even though they were committed with the connivance of superiors in rank or even on their orders, must be regarded and punished as serious war crimes. If a nation, which without warning has attacked another, finds it necessary to use such methods to fight opposition, then those guilty must be punished, whether they gave the orders or carried them out.

As extenuating circumstances, Bruns had pleaded various incidents in which he had helped Norwegians, Schubert had pleaded difficulties at home, and Clemens had pointed to several hundred interrogations during which he had treated prisoners humanely.

The Court did not regard any of the above-mentioned circumstances as a sufficient reason for mitigating the punishment and found it necessary to act with the utmost severity. Each of the defendants was responsible for a series of incidents of torture, every one of which could, according to Art. 3 (*a*), (*c*) and (*d*) of the Provisional Decree of 4th May, 1945, be punished by the death sentence.

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[1] *See* p. 85.

The defendants were found not guilty of the murder charges, but guilty of the torture allegations with the exception of one or two minor instances.

All three defendants were sentenced to death by shooting.

4. THE APPEAL TO THE SUPREME COURT

All three defendants appealed to the Supreme Court. Their appeal was based on the following arguments:

(*a*) That the acts of torture which the defendants had committed were permitted under International Law as reprisals against the illegal Military Organisation whose activities were at variance with International Law.

(*b*) That the acts were carried out on superior orders and that the defendants acted under duress.

(*c*) That the acts of torture in no case resulted in death. Most of the injuries inflicted were slight and did not result in permanent disablement.

5. THE DECISION OF THE SUPREME COURT

The Supreme Court upheld the sentence of the Lagmannsrett and rejected the appeal. Judge Larssen delivered the opinion of the Court.

Dealing with the defendants' appeal point by point, Judge Larssen said that it could not be established that the acts of torture had been carried out as reprisals. Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such. During the whole of the occupation there was no indication from the German side to the effect that their acts of torture were to be regarded as reprisals against the Military Organisation. They appeared to be German police measures designed to extort during interrogations information which could be used to punish people or could eventually have led to real reprisals to stop activities about which information was gained. The method of " verschärfte Vernehmung " was nothing but a German routine police method and could, therefore, not be regarded as a reprisal.

In Judge Larssen's opinion it was not, therefore, necessary to deal with the question whether the various acts of the Military Organisation were contrary to International Law and whether as such they justified reprisals.

As to the second point of the appeal, the argument that the acts of torture were performed on superior orders and under duress, Judge Larssen said that he supported what had been said by the Lagmannsrett in that connection. There was no definite proof that such orders had been given. The Lagmannsrett had established that on many occasions the defendants had used torture on their own accord though frequently with the connivance of their superiors. The Lagmannsrett had also established that the defendants would have been in no serious danger had they refused to perform such acts of alleged duty. New evidence had come forth in support of the latter contention. The Supreme Court was in possession of two documents, a report from Hans Latza, President of the S.S. Polizeigericht Nord, dated 4th December, 1945, and another from Dr. Helmut Schmidt of the same

Polizeigericht, dated March, 1945. The latter wrote in his report: " I regret that the Sipo did not report cases of torture. Those involved would certainly have been punished." It is evident that at least that particular Polizeigericht would not have punished any leniency towards prisoners in cases where the method of " verschärfte Vernehmung " was employed.

Judge Larssen concluded that the pleas of superior orders and duress put forward by the three defendants must therefore fail.

Considering the third point of the appeal, in which the defendants pleaded that their acts of torture had in no case resulted in death or permanent disablement, Judge Larssen found that the acts that had been committed were not casual violations of various paragraphs of Norwegian law but constituted a methodically carried out ill-treatment of Norwegian patriots, conducted throughout several years. He found no extenuating circumstances and therefore voted for the rejection of the Appeal.

The four other judges concurred.

B. NOTES ON THE CASE

1. THE OFFENCES ALLEGED

It was alleged that the accused had violated provisions made by Arts. 228, 229, 231, 232 and 233 of the Norwegian Civil Criminal Code. Of these, Arts. 228, 229 and 232 have already been quoted in these pages.(1) The remaining paragraphs read as follows:

" Art. 231. He who inflicts considerable injury to another person's body or health, or is an accomplice to such an act, will be punished with a term of imprisonment not under two years if the act was premeditated; and life imprisonment may be applied if the act resulted in death.

Art. 233. He who without premeditation causes another person's death or is an accomplice to such an act, is punishable with imprisonment for up to six years. If the act was premeditated or if it was committed in order to facilitate or conceal another crime or in order to avoid punishment for such other crime, life imprisonment may be inflicted. The same applies in cases of repeated violation and when other particularly aggravating circumstances are present.

The defendants were found not guilty of murder but guilty of the torture allegations, and in sentencing them to death the Court was acting under Art. 3 of the Decree of May 4th, 1945.(2) The question of the retroactive character of this provision and its position in relation to Art. 97 of the Norwegian Constitution had already been settled by the Supreme Court in its judgment on the appeal of Karl-Hans Hermann Klinge.(3) In considering the plea of the appellants in the present trial to the effect that their acts of torture had in no case resulted in death or permanent disablement, Judge

(1) *See* p. 12.

(2) *See* p. 89. It is to be noted that the sections of the Civil Criminal Code which the accused in this and the Klinge Case were found to have violated are contained in Chapter 22 of the Code (Offences against Life, Body and Health). In sentencing these accused to death, therefore, the Court may have acted under subsection (*c*) of Art. 3, as well as under (*a*) and possibly (*d*).

(3) *See* p. 1.

Larssen stated that the acts that had been committed were not casual violations of various paragraphs of Norwegian law but constituted a methodically carried out ill-treatment of Norwegian patriots, conducted throughout several years.

2. THE LEGAL STATUS OF THE NORWEGIAN UNDERGROUND MILITARY ORGANISATION AND THE QUESTION OF REPRISALS

The attitude taken by the Lagmannsrett to the question of the legal status of the Norwegian Underground Military Organisation is interesting, and the conclusion reached seems in effect to have been that, while the acts of the Organisation did not constitute a breach of International Law on the part either of the men involved, or of the Norwegian Government, they did amount to breaches committed by the Organisation of the laws enforced in Norway by the German occupation authorities.

In Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), p. 446, it is said that, " . . . reprisals in time of war occur when one belligerent retaliates upon another, by means of otherwise illegitimate acts of warfare, in order to compel him and his subjects and members of his forces to abandon illegitimate acts of warfare." It is to be noted that " one belligerent retaliates upon another "; and, by holding that the Norwegian Government had committed no breach of International Law, the Court ruled out the defence of reprisal. (Similarly the use of spies in wartime is not considered an illegitimate act of warfare justifying reprisals.)

Article 1 of the Hague Convention No. IV of 1907 provides that:

" The laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions:

(1) They must be commanded by a person responsible for his subordinates;

(2) They must have a fixed distinctive sign recognisable at a distance;

(3) They must carry arms openly; and

(4) They must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'."

The Lagmannsrett decided that, since the men of the Military Organisation did not come within the scope of this Article, they had no rights as soldiers and could therefore be shot when caught. Since they were held not to have infringed the laws and usages of war, however, it is assumed in these notes that the Court regarded them as having been guilty of breaches of the municipal laws then enforced by the German occupation authorities. This assumption seems to be supported by the fact that the Court held that a killing carried out by Bruns and Schubert when trying to arrest a man who was in charge of the arms of the Military Organisation did not make them guilty of a war crime. The accused could, it seems, claim that they were merely carrying out a legal duty.

Judge Larssen, delivering judgment upholding the decision of the Lagmannsrett, restricted himself to stating that the acts of torture could not be regarded as reprisals. Reprisals were generally understood to aim at

changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such. It may be added that had the men of the Military Organisation fallen within the scope of Article 1, they would have become prisoners of war on capture and reprisals taken against them would in all circumstances have been illegal, since Article 2 of the Geneva Prisoners of War Convention of 1929, in setting out in general the rights of such prisoners, provides that " . . . Measures of reprisals against them are forbidden."

3. THE LEGALITY OF SHOOTING A PRISONER WHILE TRYING TO ESCAPE

The Court held that Bruns and Clemens did not become guilty of a war crime by shooting at a prisoner who was trying to escape. This decision is reminiscent of the advice offered to the Court by the Judge Advocate in the *Dreierwalde Case*, in his statement that, if the accused Amberger " did see that his prisoners were trying to escape or had reasonable grounds for thinking that they were attempting to escape," to shoot at them to prevent their escape would not be a breach of the laws and customs of war.(1)

4. SUPERIOR ORDERS AND DURESS

The comments of both Courts on these two pleas were restricted to questions of probability, and legal problems were not touched upon in the judgments. Nor were they dealt with in those delivered by the Judges of the Supreme Court in the trial of Klinge. Judge Skau did not go beyond expressing the opinion that the acts of ill-treatment of which the defendant had been found guilty were such severe violations of the " laws of humanity " that he, the defendant, regardless of all German propaganda, could not have been in doubt that his acts, irrespective of their purpose, not only were to be condemned morally but were also unlawful.(2)

(1) *See* Volume 1 of these *War Crime Trial Law Reports*, pp. 81-87, especially the notes on pp. 86-87.
(2) *See* p. 6.

CASE No. 13

Trial of ROBERT WAGNER, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and six others

PERMANENT MILITARY TRIBUNAL AT STRASBOURG, 23RD APRIL TO 3RD MAY, 1946, AND COURT OF APPEAL, 24TH JULY, 1946

Administration of occupied territory. Recruitment of volunteers by the occupant. Introduction of compulsory military service by the occupant. Interference of head of the Administration of occupied territory in the proceedings of occupation courts. The Status of Alsace during the occupation. Jurisdiction of French Military Tribunals. The Legality of the French Ordinance of 28th August, 1944. The Plea of Superior Orders.

The chief accused, Wagner, was Gauleiter and head of the civil government of Alsace, when the province was under German occupation. The others were high administrative, Nazi Party and judicial officers. The accusations brought against them arose mainly out of the systematic recruitment of French citizens from Alsace to serve against France, abuse of legal process resulting in judicial murder, the killing of Allied prisoners of war and the mass expulsion and deportation from Alsace of Jews and other French nationals. Pleas to the jurisdiction of the Tribunal and against the retroactive application of the French Ordinance of 28th August, 1944, Concerning the Suppression of War Crimes, were unsuccessfully entered. All the accused, except one, were found guilty, and were sentenced to death.

Wagner, Röhn, Schuppel, Gädeke and Gruner appealed to the *Cour de Cassation* (Court of Appeal) on various grounds. Gruner was successful in a challenge to the jurisdiction of the Military Tribunal but the pleas of the other appellants failed.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court was the Permanent Military Tribunal at Strasbourg. Its members were:

President: Colonel Begue, Commander of the 8th Artillery Regiment.

Judges: Simoneau, chef de Bataillon, of the 23rd Infantry Regiment, former member of a resistance group; Hardiviller, Captain of the General Staff at Strasbourg, former member of the F.F.I.; Grunder, Lieutenant, of the P.O.W. depot, No. 103, former member of the F.F.I.; Bucher, N.C.O. (Adjudant-chef) of the 23rd Infantry Regiment, former member of the F.F.I.

The Public Prosecutor was Colonel Daubisse of the Military Judicial Service.

The Greffier (Clerk of the Court), was Captain Baile.

2. THE ACCUSED

The following were defendants in the trial:

Robert Heinrich Wagner, ex-Gauleiter and Reich Governor of Alsace.

Hermann Gustav Philipp Röhn, ex-deputy Gauleiter of Alsace.

Adolf Schuppel, former Chief of Section (*chef de bureau*) in the Civil Administration of Alsace.

Walter Martin Gädeke, former Chief of the Personnel Section of the Civil Administration in Alsace.

Hugo Grüner, ex-Kreisleiter of Thann.

Ludwig Luger, Public Prosecutor at the Special Court at Strasbourg.

Ludwig Semar, former first Deputy Prosecutor at the Special Court at Strasbourg.

Richard Huber, former President of the Special Court at Strasbourg.

They were accused of war crimes within the meaning of the Ordinance of 28th August, 1944, concerning the Prosecution of War Criminals.

3. THE INDICTMENT

The Indictment (*Acte d'Accusation*), drawn up by the Public Prosecutor (*Commissaire du Gouvernement*) set out the charges against each of the accused.

Wagner, Röhn and Schuppel were charged with having incited Frenchmen to bear arms against France.

Wagner, Röhn, Schuppel and Gädeke were charged with having carried out recruitment for the benefit of a foreign power at war with France.

Wagner was charged with having made attempts against individual liberty.

Hugo Grüner was charged with having committed premeditated murder.

Wagner, Röhn, Schuppel, Gädeke, Luger, Semar and Huber were charged with having been accomplices in premeditated murder.

The Indictment analysed in great detail the positions which the accused had held, the powers they had exercised, and the nature of the alleged offences.

(i) *Position and Powers of the Accused*

Wagner

Wagner, who had been Gauleiter and Reichsstatthalter of Baden, was appointed Gauleiter and Chief of the Civil Administration of Alsace in the

summer, 1940, and was ordered by Hitler to carry out the Germanisation and Nazification of the Province. He claimed to have received Hitler's (oral) orders for his activity in Alsace on the occasion of an interview at Hitler's headquarters near Grendenstadt on 20th June, 1940, i.e., two days before the signing of the Franco-German Armistice. According to Wagner, Hitler had declared that as a result of the victories of the German armies, the Treaty of Versailles was null and void, the " territorial problem of Alsace had ceased to exist " and the province had again become part of the Reich.

The Indictment summed up the position held by Wagner in his double capacity as head of the Nazi Party and of the Executive by saying that he, Wagner, wielded the same powers in respect of Alsace as Hitler did in respect of the Reich.

The entire administrative personnel, including the ordinary police and the Gestapo, were under his direct orders. Though several departments, such as finance, the postal services, transport, war economy, the Four Years Plan and national education, were controlled by the central authorities in Berlin, and though Wagner claimed that other departments would, on occasion, also receive direct orders from the Berlin Ministries, it was Wagner, the Prosecution pointed out, who had taken all major decisions which resulted in the *de facto* incorporation of Alsace into the German Reich, and who had ordered the measures affecting the life and liberty of the population of Alsace.

Thus he was held responsible for the systematic Germanisation of Alsace, for the introduction of Nazi law, the administrative and economic incorporation of the province into the Reich, for the introduction of compulsory labour and military service, for the deportations and the confiscation practice, for the setting-up of concentration camps and the infamous practices in which they indulged.

Wagner had arrogated to himself the power of final decision in the administration of justice, notably in the trials held by the Special Court, which had been established at Strasbourg by his initiative. The Indictment pointed out that no decision could be taken by that tribunal without Wagner's approval and that the hearings were adjourned whenever Wagner happened to be absent from Strasbourg.

It was his normal routine to examine the Indictment before the trial was held, and to communicate to the Prosecutor of the Special Court his orders concerning the penalty which the latter was to demand. Wagner issued these instructions in writing, under the seal of his Civil Cabinet, and the Prosecutor communicated them to the President of the Court. The instructions remained with the Prosecutor's dossier and were not filed with the records of the case.

Wagner's official powers included the privilege of mercy, but it was alleged that he consistently rejected every recommendation for mercy.

Röhn

Röhn held the function of Deputy Gauleiter of Alsace. He claimed that this was merely a Party, not an executive office and that he had no influence on the administration and government of Alsace. Even as a Party official

he claimed to have acted throughout by Wagner's orders, passing on the latter's instructions and directives by circulars to the lower levels of the Party organisation, without in any way altering them ; he had merely been " Wagner's postman."

Against this, the Indictment described Röhn as Wagner's confidant and ascribed to him considerable powers in the administration of Alsace. The Indictment referred to the account of Röhn's functions and activities given by Wagner, who described Röhn as the virtual Party leader both in Alsace and Baden, and maintained that he had issued in his own name orders and instructions, which were neither submitted to, nor countersigned by the Gauleiter. Besides, Wagner stated, Röhn had addressed such orders and instructions not only to the Kreisleiters, but also to the heads of the 22 administrative departments.

The Indictment further referred to a circular issued by Röhn in June, 1944, in which he said : " It is essential that the Party should be informed of all measures that are being prepared with a view to suppressing disorders and to fighting parachutists, so that it (the Party) can give the necessary support to the Police."

Schuppel

Schuppel, whose rank as civil servant was that of " Chief of Section," was in charge of the Department of the Interior of the Civil Administration of Alsace. His Party function was that of Gaustabsamtsleiter (head of the Chief of Staff for the Gau).

Schuppel's activities covered a wide field. He maintained the liaison between the Alsatian administrative and Party authorities on the one hand, and Party Headquarters at Munich and the central authorities on the other. He was under Wagner's and Röhn's orders, but the Indictment alleged that he held powers of decision in many departments, ranging from the organisation of rabbit-breeding in Alsace to the confiscation of Church property, from the census and " total mobilisation " of the Alsatian population for war work to the persecution of French nationals suspected by the Germans, and the deportation of resisters and their families. Besides, it was alleged, special tasks had been repeatedly allotted to him, in the execution of which he also held full powers of decision.

Gädeke

Gädeke had been Chief of the Personnel Department of the Civil Administration and head of Wagner's " Civil Cabinet." It appears that he held no responsible Party function, but was Wagner's right-hand man in the latter's capacity as Governor of Alsace. It was Gädeke who handed on to the various administrative department Wagner's orders and instructions, which were sometimes oral, sometimes in writing ; in the latter case, Gädeke would sign them, adding to his signature the note " by Wagner's orders." Gädeke attended most meetings and conferences held under Wagner's chairmanship and was present at the Governor's interviews with the Prosecutor of the Special Court. It was not alleged, however, that he attended Wagner's conferences with Gestapo officials and with the Minister of the Interior of Baden. According to the Indictment, Gädeke was fully informed of Wagner's consultations which eventually led to the

setting-up of the Special Court at Strasbourg; he knew of Wagner's interference with the procedure of that Court and abetted him in it. He took an active part in the preparation of military conscription in Alsace and in the drafting of the Order introducing conscription.

Grüner

Grüner, Kreisleiter of Thann and Lörrach, was not a member of any of the policy-making bodies in occupied Alsace; he was charged with having personally murdered four Allied airmen who had made forced landings in Alsatian territory in October, 1944.

Luger

He was Public Prosecutor at the Special Court in Strasbourg and accused of complicity in the judicial murders committed by that Court. In his capacity as Prosecutor he kept Wagner informed of all proceedings which he proposed in his *réquisitions* (formal motion concerning sentence to be awarded).

Semar

Semar, " First Deputy Prosecutor " of the Special Court, was charged with complicity in murder. Proceedings against this accused were, however, separated from those against the five others, because, having fled to the American zone of occupation, where he was subsequently arrested, he was transferred to the military prison at Strasbourg at a time when the *information* (preliminary enquiry) in the case was already closed.

Huber

Huber had been President of the Special Court at Strasbourg and, as such, had pronounced the objectionable death sentences. Through the Prosecutor, Luger, he was informed of Wagner's orders concerning the trials and submitted to these orders. Huber was tried *in contumacia* (in his absence).

(ii) *Nature of the Offences Charged*

I. RECRUITMENT OF FRENCH NATIONALS FOR THE GERMAN ARMY

(a) *The Recruitment of Volunteers*

During the early years of the German occupation attempts were made to induce Alsatians to volunteer for the German Army. A large-scale propaganda campaign was launched for this purpose and young Alsatians were invited to join the Wehrmacht and the Waffen SS. Volunteers were promised considerable advantages and privileges, and special efforts were made to obtain the voluntary service with the German Armed Forces of French reserve officers.

Wagner was held responsible by the Prosecution for the organisation and direction of all measures intended to gain volunteers. In one of his circular letters addressed to the lower Party organisations Röhn spoke of the " propaganda campaign for volunteers, which has been ordered by the Gauleiter." The Indictment, quoted, *inter alia*, passages from an appeal for volunteers signed by a group of Alsatian traitors, which expressly referred to Wagner as having inspired the campaign.

Röhn was alleged to have been the author of a number of instructions addressed to Party offices, concerning the recruitment of volunteers. In the above-mentioned circular he spoke of the necessity " of stepping-up the propaganda campaign, which must be given even more effective support than hitherto by the Party and its formations." An example must be set, he said, by young Alsatians employed on salaried jobs in the Party, and he summed up the instruction in the words: " I enjoin upon you to avail yourselves of every opportunity to emphasize the historic importance of the participation of German Alsace in the struggle for liberation and against Bolshevism, in which the great German Reich is engaged." It was Röhn who directed the Kreisleiters by circular to arrange personal interviews with French volunteers.

Schuppel was accused of having taken part in these activities.

(b) *Military Conscription*

The appeals for volunteers proved a failure. On Wagner's own account, only about 2,300 persons responded, and it was alleged that even this negligible contingent included a number of German nationals resident in Alsace.

As a preliminary step towards the introduction of compulsory military service, labour service was introduced in 1941, and military conscription followed in 1942.

The Indictment pointed out that the Germans had given repeated assurances that they had no intention of enlisting Alsatians for the German army.

Early in 1942, a number of Alsatians who had fled to Switzerland were obliged to return home, and in an agreement concluded on that occasion between the German Reich and Switzerland, Germany gave the undertaking that the young people would not be called up in the course of the war.

Military conscription was introduced in Alsace by Wagner's *Ordinance of 25th August*, 1942, which had the following wording:

" By virtue of the powers conferred upon me by the Führer, I order as follows:

Section 1. Compulsory military service with the German armed forces is herewith introduced in Alsace for all Alsatians of German race who belong to any of the age groups to be designated by special order.

Section 2. The persons liable to military service, who have been called up shall be subject to the provisions applicable to German soldiers and shall have the rights that belong to German soldiers."

Section 3 of the Ordinance analogously defined the status of persons liable to, but not actually on, active military service.

The cited Ordinance was promulgated simultaneously with an Ordinance concerning the acquisition of German nationality by Alsatians. This second ordinance merely gave effect in Alsace to the Decree of the Reich Minister of the Interior of 23rd August, 1942, concerning the acquisition of German nationality by Alsatians, Lorrainers and Luxemburgers, which had been issued under a provision of the Order of the Council of Ministers for the Defence of the Reich, of 20th January, 1942, enabling the Minister

of the Interior to grant collective naturalisation to certain groups of aliens. The Decree of the Reich Minister of the Interior of 23rd August, 1942, given effect to in Alsace by Wagner's Ordinance of 25th August, 1942, provided, *inter alia,* that " Alsatians, Lorrainers, and Luxemburgers of German race who have been called up or will be called up for service with the Wehrmacht or with the Waffen SS., or who have proved themselves as reliable Germans and are recognised as such " could be granted naturalization. The acquisition of German nationality would take effect as from the day of joining the Wehrmacht or the Waffen SS. (or from the recognition as a reliable German).

The Ordinance introducing compulsory military service was supplemented by the following carrying-out orders :

Order of 27.8.42, by which the 1920-24 classes were called up.

Order of 5.11.42, by which military service was made compulsory with retroactive effect as from 25.8.42, for all persons acquiring German nationality.

Order of 1.1.43, calling up the 1914-1919 classes.

Order of 1.10.43, concerning sanctions against deserters, persons failing to comply with call-up orders for military or labour service, and against their relatives.

Order of 9.9.44, extending compulsory military and labour service to the 1928 class.

Order of 25.10.44, extending to Alsace the operation of the Order of the Führer concerning the Volkssturm, and involving all able-bodied men from 16-60 years of age.

The Indictment gave the following summary, based mainly on Wagner's and Gädeke's accounts, of the events which preceded the introduction of compulsory military service in Alsace.

At an unspecified date in 1942, Gädeke was ordered by Wagner to consult the responsible officials of the administrative section of the Civil Administration and of the Police, as well as representatives of the " Territorial (Wehrmacht) Command," on the advisability of conscripting Alsatians for the German army. The replies were all in the negative, even in the case of the military authorities, though the latter would obviously have welcomed an increase of available man-power. According to Gädeke all persons consulted had expressed doubts as to the legality of the proposed measure, in view of the " unsettled status of Alsace."

In spite of this, Wagner contacted Bürckel, Gauleiter of Lorraine, and Simon, Gauleiter of Luxembourg, suggesting to them a joint *démarche* in the matter. Hitler, having been informed by the three Party officials of their intentions, convened a conference at Vinnitza in the Ukraine, which was attended, in addition to Hitler and the three Gauleiters, by Keitel, Ribbentrop, Himmler and Bormann. It was Wagner who, after having made a detailed report on the situation in Alsace, proposed the introduction of compulsory military service in the province. The other Gauleiters endorsed the proposal. Hitler then gave orders for conscription to be introduced in the three territories, leaving it to the Chiefs of the respective Civil Administrations to settle all matters of detail. As usual, Hitler's order

was oral. Keitel had strongly recommended the measure during the debate.

The Indictment emphasised the fact that Wagner had been the motive power in preparing and introducing compulsory military service and in support of this allegation referred to a speech made by Wagner at Strasbourg a few months after the introduction of the measure, in which he declared that, seeing that the majority of Alsatians were not aware of their duties towards their new fatherland, one man had to act on behalf of all and that that man could only be he, Wagner, himself. " I therefore solicited the Führer's permission," he said, " to introduce compulsory military service in Alsace, and I have now been given that permission."

After his return from Vinnitza, Wagner, through Gädeke, ordered the Ordinance introducing conscription to be drafted by the administrative section of the Civil Government. With the Ordinance, orders concerning repressive measures to be taken in the case of disobedience were drafted by Gädeke and further transmitted to all Party organisations by a circular issued by Röhn. These instructions provided that every Alsatian liable to military service who failed to report to the Medical Boards or otherwise to comply with his duties under the Ordinance was to be arrested and immediately deported to the Reich. Any attempt at rioting was to be suppressed with the utmost ruthlessness by the police, who were to make use of their weapons on the slightest provocation.

It was alleged that conscription was enforced with the utmost brutality ; numerous deserters and persons who had disobeyed call-up orders were shot, and their families dispossessed and deported to Germany.

Röhn was charged with having circulated the above instructions received from the administrative section, and of having himself drafted and circulated instructions to the Kreisleiters concerning the recruitment of A.R.P. personnel the call-up of the 1908-1913 classes, and the call-up of French reserve officers.

Schuppel was likewise held responsible for having circulated Wagner's orders and instructions concerning compulsory military service. Besides he had issued circulars concerning the deportations of the families of deserters, etc., in which he criticized the delays in the deportation procedure. He was also the author of a circular concerning the employment of Alsatian girls with German military units.

Gädeke was not indicated on the charge of participation in the voluntary recruitment of French nationals ; he was, however, accused of having participated in compulsory recruitment. His part in the events appears from the above account.

II. MURDER AND COMPLICITY IN MURDER

These charges were based on three types of facts : (*a*) Judicial murder, (*b*) the shooting of captured allied airmen, (*c*) the killing of persons detained in concentration camps and prisons.

(a) *Judicial Murders*

The Case of Théodore Witz

This young Alsatian had been involved in proceedings in the Special Court at Strasbourg. The offence for which he was tried was the illegal

possession of a gun, though this was in fact a very old model. Shortly before the trial his Counsel, Maître Merckel, discussed the case with the Prosecutor, who told him that he did not consider Witz as a dangerous criminal, but rather as an excitable youth, and that in his motion concerning the penalty to be inflicted (*réquisition*) he had not proposed the death penalty, but confinement (*réclusion*) for a term of four to five years. When, according to the established practice, the file was submitted to Wagner, however, the latter is alleged to have dictated to Gädeke the following remark : " Yes, to be executed. Urgent," which Gädeke took down in his own hand.

Witz was actually sentenced to death by the Special Court (with Huber as the Presiding Judge), and the sentence was executed. The recommendation for mercy, which was supported by the German Prosecution, was rejected by Wagner.

The " Ballersdorf Case "

In the night of 13th February, 1943, a group of Alsatians, attempting to pass over into Switzerland, had been intercepted by frontier guards, and in the ensuing clash one guard and three of the fugitives were killed.

In the afternoon of 16th February, 1943, the trial was held of 14 survivors of the group, before the Special Court at Strasbourg. The following facts were alleged by the Prosecution in support of the contention that the most elementary principles and rules even of the German law of procedure were disregarded in the " Ballersdorf trial."

Thus, the Indictment referred to a note written in Huber's own hand to the effect that he, the President of the Court, did not receive the Indictment against the 14 men until 12.30 p.m. on the day of the trial. Two hours later, the accused were allowed to see the Indictment and to communicate with their counsel, who had all been appointed *ex officio*. This, the Prosecution pointed out, was in flagrant violation of the German law in that the accused had not been notified of their right to demand a supplementary enquiry, to name witnesses and to choose their own counsel. Moreover, two of the accused, Brungard and Müller, who were under age, had not been examined by a psychiatrist before the trial.

A medical expert was, however, heard at the trial itself on the responsibility of these two accused. This expert declared Brungard fully responsible, but considered Müller mentally deficient and proposed that the latter should be taken to a mental institution for further examination. Upon this motion, the Court passed a decision under Art. 81 of the German Code of Criminal Procedure for the separation of the trial against Müller and ordered his removal to a mental hospital.

Before this incident, evidence had been produced of the fact that the frontier guard had been killed by one of the three men who had themselves met with their death in the encounter, and that the accused Gentzbittel had not been present when the clash occurred.

Immediately after the decision for the separation of the proceedings against Müller was passed, the hearing was adjourned. The President of the Court, Huber, the Public Prosecutor, Luger, and the Gestapo and S.D. officials left the Court building and were absent " for a considerable time." It was hinted that during this interval they were received by Wagner.

The hearing was resumed for the final speeches only. In summing up for the Prosecution, the Prosecutor is alleged to have admitted that there was no evidence of the guard having been killed by any of the accused. In spite of this admission, he demanded sentence of death for all of them, and the 13 death sentences were pronounced.

The trial, which had begun late in the afternoon and had been adjourned for some time, was closed at 7.0 p.m.

The 13 condemned men, as well as Müller, were packed on a Gestapo lorry and taken to the Struthof camp. On the following morning they were killed in the most brutal manner by an S.S. detachment in a sand quarry near the camp.

About the fate of Müller, whose case had been separated from that of the other accused, the following facts have come to light: several weeks after the trial, the Prosecutor General of the Court of Appeal at Karlsruhe enquired about the state of the proceedings against Müller. In his reply, Luger reported that Müller had been taken to a concentration camp, where " he had meanwhile died." It appears, however, that he was killed together with the other 13 men ; for, on the morning of the executions, Wagner had rejected an appeal for mercy which had been made on their behalf, and in the list of names contained in his decision the name of Müller was included, while that of Brungard had been omitted. A " corrected " list was sent to Luger by Gädeke, when, weeks after the execution, the mistake was pointed out to him. The question whether the inclusion of Müller's name in the list was, in the Prosecutor's words, a deliberate " piece of machiavellianism," or a genuine error, was left open in the Indictment.

Throughout the Preliminary Enquiry, Wagner denied having had any knowledge of the irregularities of procedure, of the adjournment of the hearing and, in particular, having received the members of the Court during the interval and given them any instructions concerning the sentence. Luger's correspondence with the Prosecutor General, however, made it clear that the Gestapo had already received Wagner's orders for the shooting of the 14 men even before Luger was received by Wagner and before the trial was opened. This account was borne out by Gädeke's depositions ; according to him, Wagner's original intention had been to have the men shot without any trial, and he only accepted the idea of a trial in the Special Court after a long discussion with a German official and on condition that the trial would be held within 24 hours.

(b) *The murder of four Allied airmen*

On 7th October, 1944, four unknown British airmen made a forced landing at Rheinweiller in Alsace. They were arrested by German pioneers and taken to the town hall. The gendarmerie station at Schlingen was informed of the incident and a detachment of gendarmes led by the *maître gendarme* Reiner went to Rheinweiller to take charge of the prisoners. On their arrival, they found the captured men outside the town hall, surrounded by a crowd which was said to have been " curious rather than hostile " and were faced with the fact that Grüner, Kreisleiter of Thann and Lörrach, had taken control of the situation. Reiner's plan was to take the prisoners to the gendarmerie barracks and to arrange for them to be taken over by the military authorities. Grüner, however, prevented him from doing so. The

account given in the Indictment of the events that followed, was based mainly on depositions made by Grüner himself in the course of the Preliminary Enquiry.

Grüner had told the gendarmes that he was under orders from Wagner to shoot every Allied airman that was captured. He had then ordered the prisoners to be marched off one by one each escorted by a German, and the groups to keep a distance of 50 m. from one another. He had then followed the procession in his car, had taken each prisoner separately to the banks of the Rhine and had shot them with his own *mitraillette*, which he declared to have always carried with him. The bodies of the murdered men were thrown into the river. Grüner withdrew part of his admission during his interrogation saying that the actual shots had been fired by another person ; but even then he admitted that he had given the order for execution. The Indictment maintained that the second version given by Grüner was untrue.

Grüner reported the incident to Schuppel, Wagner not being at his office on that particular day. On the following day he attempted to induce the *maître gendarme* to make a false report to the " Landrat," i.e. to say that the four prisoners, while under escort, had been attacked and " carried off " by men hidden by the roadside.

During the Preliminary Enquiry, Grüner, Wagner, Röhn and Schuppel had mutually incriminated one another. Grüner maintained that the execution of " terror flyers " had been discussed at numerous meetings which were under Wagner's chairmanship, held early in 1944 and at which Röhn had always, Schuppel sometimes, been present, and that Wagner had expressly ordered the Kreisleiters to shoot captured airmen themselves, whenever they had an opportunity of doing so. According to Röhn and Schuppel, Wagner's instructions to the Kreisleiters were to hand captured airmen over " to the vengeance of the population," or, in Schuppel's version, to incite the mob to lynch them. Wagner claimed that these or similar orders had emanated from Goebbels and Himmler and had been communicated to the Kreisleiters not by him, but by Röhn. Among the witnesses for the Prosecution heard in the Preliminary Enquiry, was the former mayor of Mulhouse, who had heard Wagner " explain " the murders of prisoners as reprisal action taken by the population, which was in a state of frenzy as a result of allied air attacks.

(c) *Murders committed in prisons and concentration camps*

Several hundred members of the resistance movement (*Réseau alliance*), accused of having assisted prisoners of war, deserters, etc., to escape, had been interned in the Schirmeck concentration camp and a number of prisons. After the invasion of the Continent by the Allies, 102 of the 104 detainees at at the Schirmeck camp, 87 men and 15 women, were transferred to the extermination camp Strutthof, where they were shot during the night of 1st September, 1944.

Towards the end of November, 1944, 63 inmates of prisons were shot by a certain Gehrum, who made a tour of the prisons for the purpose of exterminating Alsatian patriots. A further contingent was executed after trial in the Special Court at Karlsruhe.

As the crimes committed at the Strutthof camp were to be dealt with in a special trial, the Indictment referred only briefly to the daily executions by

hanging or shooting, which took place for years at that camp, and to the gas-chamber " experiments " that were undertaken there by a certain Professor Hirt. Specific mention was made of 80 women and some 50 men who were killed in the Strutthof gas chambers in August, 1943.

The Prosecution alleged that Wagner, who had ordered the setting-up of the Schirmeck camp, who had inspected the installations at the Strutthof and who was on intimate terms with the said Professor Hirt, must have been aware of the criminal activities carried on by persons who were under his direct orders. Wagner denied any such knowledge.

III. OFFENCES COMMITTED AGAINST THE LIBERTY OF THE INDIVIDUAL

The facts adduced by the Indictment under this head are these :

(i) *Compulsory labour service* was introduced in 1941. When, in August, 1941, the first contingents received orders to appear before the Medical Boards, the parents of the young people were promised that they would not be sent to Germany. As a matter of fact, the first transports bound for German labour camps left in October, 1941.

(ii) *Expulsion from Alsace* into unoccupied France was the method used by the Germans before 1942 to get rid of persons regarded by them as undesirable.

Many Jews, foreseeing events, had left in haste, before the arrival of the Germans, taking with them their most treasured belongings. But for most the persecutions commenced immediately. At Mulhouse for instance they had to meet daily and clean the streets of the town, and on 16th July 1940, all of the Jews of Colmar were called together at the Police Station, and, each furnished with a suit-case and 2,000 francs, they were crowded together in trucks and carried to the lines of demarcation where the French received them. Wagner himself stated that 22,000 Jews had been affected by these first expulsions. Before the declaration of war there were in Alsace around 50,000 Jews, including German refugees.

After the Jews, the French had to suffer. Some French officials of whom the Germans had had need for the transmission of powers were able to leave and take even their furniture, personal property, but these were rare exceptions. The great majority were expelled in August 1940, under the same conditions as the Jews, each with a suitcase and 2,000 francs. Then came the turn of the various groups of Francophile Alsatians. Some particular expulsions were put into effect in the September, October and November of 1940, but the great " cleaning up " took place in the month of December. It was the SS which carried these out with their usual brutality. Everywhere, in all the towns and villages, they took away persons whom they suspected, all the social classes being affected by this stroke.

After these mass expulsions there took place certain individual expulsions, of which the greater part of the victims stayed for a greater or lesser time in the camp of Schirmeck.

(iii) *Deportation to Germany* became the practice from the summer of 1942 onwards. Special camps were created for deported Alsatians at Ulm and Breslau. Deportation was the normal sanction taken against families if one of their members had not complied with call-up orders for military or labour service, or even for the failure of a child to join the Hitler Youth.

The lot of all these unfortunate people was terrible. They lived under strict supervision in camps without comfort, children often being separated from their parents.

(The indictment then went on to describe in some detail the eventual fate of the property of those deported. The belongings of all the exiles were confiscated and sold for the benefit of the Reich; for more than three years these belongings were sent twice a month to public auction in the big towns. The most valuable movables disappeared as if by magic. The Germans took on hire furnished apartments, then went away again taking away the furniture. Again, the farms of more than 500 peasants who had been deported because their children had refused to present themselves for medical inspection for labour services or military services were immediately given to German peasants.)

Wagner was the only accused who was indicted on a charge of " illegally depriving individuals of their liberty." In his defence he claimed to have been ignorant of many of the alleged facts and in particular to have disregarded Hitler's orders in favour of the population of Alsace. He had received definite orders from Hitler to expel several hundred thousand Alsatians; in fact only about 25,000 had been forced to leave.

(4) THE EVIDENCE BEFORE THE COURT

Complete records of the trial not being available, such evidence as was produced during the hearing of the case cannot be dealt with in this report. Some indications of the evidence relied upon both by the Prosecution and the Defence, can, however, be gathered from references in the Indictment to depositions made in the course of the Preliminary Enquiry, and from the Judgment.

Apart from the mutually incriminating evidence of the accused themselves, the Court heard, *inter alia*, the accounts given of the case of Théodore Witz and the Ballersdorf case by the lawyer who had acted as counsel for the defence in these cases, and of one of the Prosecutors of the Special Court. In the case of the four murdered airmen, the depositions of the *maître gendarme* who had been summoned to take charge of the prisoners, were available. As will be seen, the charges of illegal recruitment were brought against the accused in two forms; on the one hand they were indicted on the general charge of having recruited French nationals for a Power at war with France, on the other hand they were charged with having caused the incorporation into the German Army of six individual Alsatians, who had been called up at various dates between January 1943 and 1944. One of these six men was heard during the trial; he made his depositions not as a sworn witness, but as a person called upon to give information without taking an oath. Among the evidence considered by the Court were also depositions made by Keitel, Ribbentrop and Lammers, obtained through a *commission rogatoire* of the *juge d'instruction.*

The Indictment dealt at length with the general line of defence taken by the accused during the Preliminary Enquiry.

In most cases they had denied any knowledge of the criminal acts with which they were charged. Apart from this, they relied mainly on two defences: (*a*) the denial of the illegality of the acts or measures which formed the substance of the charges, (*b*) the plea of superior orders.

In regard to the charge of illegal recruitment Wagner maintained on the one hand that, according to reports which he had received from the Police

and the Party formations, the majority of Alsatians were anxious to join the German Army, but were deterred from enlisting as volunteers by fear of the disapproval of their compatriots; conscription enabled them to gratify their wish without any anxiety. On the other hand he claimed that in his opinion the recruitments had not been illegal, Alsace having been incorporated in the Reich. (*See below*).

5. PLEAS OF THE DEFENCE

(i) *Plea to the Jurisdiction of the Court*

Counsel for the accused Grüner offered a Plea to the Jurisdiction of the Court. (Under Art. 81 of the Military Code, pleas to the jurisdiction of the Court must be raised before the hearing of witnesses.)

The Plea was rejected by the Tribunal on the following grounds:

(*a*) The Tribunal had been seized with Grüner's case by an Order for Trial (*ordonnance de renvoi*) issued on 6th April, 1946, by the *juge d'instruction* under Art. 177 of the Military Code. All accused and their counsel had been duly notified of the Order and no objection had been raised.

(*b*) Under Art. 177 of the Military Code[1] the provisions of Art. 68 of that code (concerning the exclusive authority of the Indictments Division of the Court of Appeal, *Chambre des mises en accusation de la Cour d'appel*, to commit cases for trial to a Military Tribunal) was inapplicable in times of war. Under Art. 177, the decision on the question whether an offence comes within the jurisdiction of a Military Tribunal and the authority to commit the trial to such Tribunal rests with the *juge d'instruction*; the Orders for Trial issued by the *juge d'instruction* (*ordonnance de renvoi*) have the same effect as Orders for Trial issued by the Indictments Division of the Court of Appeal (*arrêts de renvoi*).

(*c*) It is an established principle that the *arrêt de renvoi* issued by the Court of Appeal is constitutive of the jurisdiction of the Court to which it commits the case for trial. The same principle applied to the Order for Trial issued by the *juge d'instruction* where such Order replaces the decision of the Court of Appeal. No appeal lying against the Order of the *juge d'instruction* of 6th April, 1946, it had become final.

(*d*) Three of Grüner's co-defendants, Wagner, Röhn and Schuppel, were being tried on the one hand for complicity in the murders with the commission of which Grüner was charged, on the other for offences which were undeniably within military jurisdiction. The proceedings against Wagner, Röhn and Schuppel being inseparable from those against Grüner, it was essential in the interest of the effective administration of justice and the establishment of truth, that the accused should all be tried by the Strasbourg Military Tribunal.

(ii) *Plea relating to the status of Alsace*

As has been seen, Wagner claimed that his recruitment had not been illegal, Alsace having been incorporated in the Reich. In this connection,

[1] *See* the notes on the case, p. 49.

Wagner referred to his interview with Hitler, shortly before his appointment as Gauleiter and Governor of Alsace, to the terms of the Armistice denouncing the Treaty of Versailles, and to certain " tacit or secret agreements " concerning the status of Alsace.[1]

The Prosecution denied that Wagner could have held in good faith his view that his recruitments were legal, and in support of this contention adduced the following facts :

(*a*) In a letter dated 9th July, 1942, and addressed to Bormann, one of the Departments of the Civil Administration expressed the view that nobody except Hitler himself was in a position to say whether " the introduction of German nationality in Alsace " was, or was not, compatible with the terms of the Armistice.

(*b*) Wagner could not have been ignorant of the vehement protests raised by the French (Vichy) Government against the compulsory recruitment of Alsatians for the German Army.

(*c*) Wagner must have had knowledge of the protests raised by the French Government against his demand for the resignation of the Deputies Haut-Rhin and Bas-Rhin ; the French Government's note, dated 28th July, 1941, expressly stated that France did not recognize the legality of the German Civil Administration in Alsace. Wagner must also have known of the note of the French Government of 17th September, 1941, protesting against the introduction of compulsory labour service in Alsace and declaring that Germany was not entitled under the Armistice to introduce this measure.

(*d*) The Prosecution referred to the following incident which took place in 1942, and of which Wagner must have had knowledge : Abetz, German Ambassador with the Vichy Government, was asked by Ministerialrat Kraft, an official of the Civil Administration of Alsace, to support the demand for the restitution to Strasbourg University of the equipment of its Science Institutes. To this request, Abetz replied to the effect that, in contrast with what had happened in 1918, the status of Alsace had not been settled by the Armistice of 1940. This, he said, was true in spite of the *de facto* situation created after 1940 by unilateral administrative measures taken by the Germans and based on rules and regulations introduced by them. The French Government could not be expected to give recognition, by the gesture of relinquishing possession of the material in question, to a *de facto* state of affairs, before they had even been asked by the German Government to recognize this state *de jure*.

Besides, Wagner's attention had been drawn to the illegality of introducing compulsory military service in Alsace by high officials of his own Civil Administration and by responsible military circles in Alsace.

Other accused merely repeated Wagner's contention that Alsace was part of the Reich by virtue of the Armistice of 1940, which had declared the Treaty of Versailles null and void.

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(1) *See* pp. 25 and 36.

(iii) *The Plea of Superior Orders*

Wagner occasionally referred to orders he had received from Hitler. All other accused claimed to have acted on orders from Wagner, either in the latter's capacity as Head of the Civil Administration or as Gauleiter.[1]

(iv) *The Challenge of Wagner's Counsel to the legality of applying the Ordinance of 28th August,* 1944

The Tribunal rejected the contention of Wagner's counsel that the retroactive application of the Ordinance was not legal, on the following grounds :

The Ordinance in question provides in its Art. 1 that French Military Tribunals shall be competent to try under the French law in force and in accordance with the provisions of the Ordinance, such *enemy nationals* and non-French agents who are or were in the service of the enemy administration or interests, as are guilty of *crimes or offences committed since the beginning of hostilities* either in France or in any territory under French authority.

Wagner, the decision went on to say, was a German national. He was tried for crimes punishable under the Penal Code and committed between 940 and 1944, i.e., after the beginning of hostilities. These crimes had een committed in Alsace, i.e., in French territory.

The Ordinance in question establishes the jurisdiction of Military Tribunals to try enemy nationals for such offences as are not justified by the laws and ustoms of war, even if they were committed under the pretext of or during state of war.

The Tribunal, whose jurisdiction had been duly established by the Order for Trial of 6th April, 1946, which order had become final, was not competent to decide on the correctness of applying the Ordinance.

The decision further referred to directives issued by the Ministry of War, Direction of Military Justice, and to its own decision rejecting the plea to its jurisdiction, which had been offered by counsel for the accused Grüner.

6. PROGRESS OF THE TRIAL

The trial having been opened on 23rd April, 1946, the Presiding Judge ruled that in view of the fact that the accused Huber had not presented himself within five days of the issuing of the order to appear, made by the Judge under Art. 119 of the Military Code, judgment would be passed in default.

After the interrogation of the accused for purposes of identification, the *Commissaire du Gouvernement* (Prosecutor) made a motion for the disjunction or severance of the trial against the accused Semar. The application was granted by the Court and the disjunction of the trial ordered on the grounds that Semar had been handed over to the Strasbourg Military Tribunal after the closure of the Preliminary Enquiry and had therefore not been interrogated by the *juge d'instruction* ; that the effective administration of justice required that the trial and judgment against Semar's co-accused should not be postponed ; and finally that the disjunction was not prejudicial to the interests of the other accused. The Tribunal based its decision on Art. 474 of the Code of Criminal Procedure, which provides that the absence

(1) *See* p. 54.

(*contumace*) of any accused must on no account lead to an adjournment or delay in the proceedings against the co-defendants who are present. At the same time the Tribunal ordered a supplementary *information* to be instituted and conducted by one of the Judges of the Tribunal.

The President, in accordance with Art. 79 of the Military Code, then ordered the reading of the Order convening the Tribunal, of the decision committing the case to the Tribunal, of the Indictment and of a number of other documents ; he gave a summary of the crimes for which the accused were prosecuted and instructed them and their counsel of their rights and duties under the Military Code and the Code of Criminal Procedure.

After hearing the plea of Grüner's Counsel to the Jurisdiction of the Tribunal, the latter proceeded to the interrogation of the defendants Schuppel, Gädeke and Röhn. Before the interrogation of Wagner, application was made by his counsel for a number of new witnesses, among them Keitel, Ribbentrop and Lammers, to be heard. The Tribunal rejected the application for the time being, ordering the " junction of the incident to the substance of the case " and reserved its final decision on the matter until the hearing of the other witnesses had been completed. The decision was based on the consideration that the trial was not sufficiently advanced to enable the judges to decide whether the hearing of the proposed new witnesses was essential to establish the truth.

The following days of the trial were devoted to the interrogation of Wagner, and the hearing of witnesses and a number of persons called to give information.

On the seventh day of the trial, the Presiding Judge, by virtue of his discretionary power under Art. 82 of the Military Code, ordered a number of documents, received by the Court after the closure of the Preliminary Enquiry, to be filed with the records of the case. Among these documents were the depositions of Keitel, Ribbentrop and Lammers, obtained through a *commission rogatoire* of the *juge d'instruction.*

The hearings were closed on the eighth day of the trial. In his final address the Prosecutor required that the accused be convicted and sentenced in accordance with the Indictment.

Then followed the final addresses by counsel for the defence. In his *plaidoyer*, counsel for Wagner requested a decision by the Court on the legality of applying the Ordinance of 28th August, 1944, retroactively.[1]

Finally the Tribunal passed a decision on the application for the hearing of new witnesses made earlier in the trial by counsel for Wagner.

The application was rejected on the following grounds :

Counsel for Wagner had been free during the Preliminary Enquiry to communicate with his client. He had been notified of the date of the trial on 7th April, 1946, and had access to the documents relating to the case. Both Wagner and his counsel had received the instructions concerning the naming of witnesses in accordance with Art. 179 of the Military Code. Wagner had thus been given sufficient time to prepare his defence. The addresses by counsel for the Prosecution and for the Defence had supplied sufficient material on which the judges could base their decision. The

(1) *See* p. 38.

hearing of further witnesses was therefore not essential to establish the truth.

At every stage of the trial as set out above, the Prosecution, the defendants and their counsel were invited to make their observations, the defence " having the last word."

All decisions mentioned above were announced as having been arrived at by a majority vote, in accordance with Art. 91 of the Military Code, which, provides that " the Judgment shall merely state the fact of the majority of votes without indicating the number of pro and contra votes, non-compliance with this provision involving the nullity of the Judgment."

7. THE QUESTIONS EXAMINED BY THE TRIBUNAL AND THE VERDICT

Under Art. 88 of the Military Code, which provides that the :

> " Presiding Judge shall announce the questions arising from the Indictment and the hearings which will be put to the Judges,"

the Tribunal was called upon to examine a total of 207 questions for their findings. These questions fall into the following groups :

(*a*) A group of questions relating to the incriminated *facts* and their classification. The Tribunal was asked whether the deaths of Théodore Witz and the 14 accused of the Ballersdorf case were due to wilful homicide and whether such homicide had been committed with premeditation ; whether in the case of the four airmen wilful homicide had been committed and in each case whether such homicide was preceded, accompanied or followed by some other crime ; whether six individual Alsatians had at definite dates in 1943 and 1944 been enrolled in the German army.

The findings of the Tribunal on each of these 44 questions was in the affirmative.

(*b*) Questions relating to *Wagner*

In regard to the murders of Théodore Witz and 13 of the accused in the Ballersdorf case the Tribunal considered the question whether Wagner, in abusing his power or authority, had been an accomplice in the crime by dictating or ordering the sentence to be awarded by the Special Court. Wagner was found *guilty* on the charge of complicity in these murders.

He was found *not guilty* of having ordered the 14th accused, Müller, to be executed without sentence.

His complicity in the murder of the airmen was examined by reference to the question whether, in abusing his power or authority he had given orders for allied airmen to be killed on the spot. He was found *not guilty* on this charge.

He was found *guilty* of having during the years 1940 to 1942 incited French nationals to bear arms against France, by addressing to them appeals to join the Wehrmacht at a time when France was at war with Germany. He was further found *guilty* of having recruited French nationals for the German armed forces, and of having caused the recruitment of the six Alsatians by signing the Ordinance of 25th August, 1942.

Wagner was the only accused in regard to whom the question was asked whether he was guilty of having, during the years 1940 to 1944, arbitrarily

deprived French nationals of their liberty. The Tribunal found him *guilty* on this charge, and answered in the affirmative the further question whether he had during the material period held the *de facto* executive power in Alsace.

(*c*) Questions relating to *Röhn*

The Tribunal considered the question whether Röhn was guilty of having incited French nationals to join the Wehrmacht, of participation in illegal recruitment in general and in the recruitment of the six Alsatians, the first by circulating Wagner's orders and instructions, concerning compulsory military service, the latter by passing on the circular letter concerning persons disobeying call-up orders. He was found *guilty* on all these charges.

He was found *not guilty* of having given instructions for the killing of allied airmen, and thus of complicity in the four murders.

In regard to each of the charges the Tribunal considered the question whether Röhn had acted on superior orders. This question was answered in the negative throughout.

(*d*) Questions relating to *Schuppel*

Schuppel was found *guilty* on the charges (*a*) of having incited French nationals to bear arms against France, (*b*) of participation in illegal recruitment in general on the ground that he had circulated Wagner's orders and instructions, in particular the order concerning sanctions against Alsatian deserters and persons not complying with their military duties ; (*c*) of participation in the illegal recruitment of one of the six Alsatians, this latter crime having been committed by him by issuing the circular letter of 13.12.43 concerning sanctions against the families of deserters.

He was found *not guilty* of having been an accomplice in the murder of the four airmen by approving Wagner's relative orders.

The Tribunal denied that he had been acting on superior orders.

(*e*) Questions relating to *Gädeke*

Gädeke was found *guilty* on the charge of illegal recruitment in general and of participation in the recruitment of the six Alsatians, the first on the ground that he had circulated Wagner's orders and instructions concerning compulsory military service, the latter because of his authorship of the circular threatening sanctions against resisters and their families.

He was found *guilty* of complicity in the murder of Théodore Witz on the ground that he had taken down Wagner's order to the Court to pass sentence of death, and in the murder of the 13 Ballersdorf men on the ground that he had passed on to the Prosecutor Wagner's order to demand sentence of death.

He was not found to have acted on superior orders.

(*f*) Questions relating to *Grüner*

Grüner was found *guilty* of the premeditated murder of the four airmen, each offence being preceded, followed or accompanied by another crime. The Tribunal found that he had not acted on the orders of his superiors.

(*g*) Questions relating to *Luger*

The Tribunal examined the questions whether Luger, by demanding sentence of death against the accused in the Ballersdorf trial under pressure from Wagner was an accomplice in the murder of the 13 men. He was found *guilty* on this charge.

The Tribunal, however, came to the conclusion that he had acted on superior orders.

(*h*) Questions relating to *Huber*

Huber was found *guilty* of complicity in the murder of Théodore Witz and the 13 Ballersdorf men on the ground that under pressure from Wagner he had pronounced death sentences against them.

The Tribunal found that he had not acted on superior orders.

8. THE SENTENCES

Wagner, Röhn, Schuppel and *Gädeke* were sentenced to death and confiscation of their entire property for the benefit of the nation.

Grüner and *Huber* were sentenced to death. The sentence on Huber was pronounced in his absence.

Luger was acquitted.

All accused, including Luger, were declared to be jointly and severally liable for the costs of the proceedings.

9. RECOURSE TO AND DECISIONS OF THE COURT OF APPEAL (*Cour de Cassation*)[1]

Wagner, Röhn, Schuppel, Gädeke and Grüner lodged appeals on a number of different grounds relating both to procedural and substantive law. Their arguments are set out below, together with the decision of the Court as to each plea. The order in which the Court dealt with the pleas put forward has not been disturbed in this report, but headings have been added for the convenience of the reader. It will be noted that, of the five appellants, only Grüner was successful. The Court delivered judgment on 24th July, 1946.

(i) *The Composition of the Military Tribunal* (2)

The Court of Appeal first decided on a plea put forward by Wagner, Röhn and Schuppel, and based upon the alleged violation of Art. 156 of the *Code de Justice Militaire*, claiming that the Military Tribunal was irregularly composed because Wagner had the rank of a General commanding an Army Corps and the Tribunal could not, therefore, properly be presided over by a Colonel.

The judgment of the Court of Appeal pointed out that, according to Art. 5 of the Ordinance of 28th August, 1944, " For adjudicating on war crimes the Military Tribunal shall be constituted in the way laid down in the *Code de Justice Militaire*."

The provisions of Arts. 10 *et seq.* and 156 of the *Code de Justice Militaire*, which varied the composition of Military Tribunals according to the rank of the accused, applied only to French military personnel and to persons treated as such.

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(1) *See* p. 100.
(2) *See* p. 94.

Paragraph 13 of Art. 10, according to which Military Tribunals called upon to try prisoners of war are composed in the same way as for the trial of French military personnel, that is according to rank, would not be applied to Wagner, who was not sent before a Military Court as a prisoner of war. It was therefore right that the appellants were brought before a Military Tribunal composed in accordance with Arts. 156 and 186 of the *Code de Justice Militaire.*

(ii) *Four Pleas Based upon Alleged Infringements of the Procedural Rights of the Accused* (1)

(*a*) The Court of Appeal had next to decide on a plea put forward by Wagner, Röhn, Schuppel and Gädeke, alleging a violation of Art. 65 of the *Code de Justice Militaire* in that the Order for Trial had been issued on the 6th April, 1946, before the return of a Commission of Enquiry sent by the *juge d'instruction* on 14th March, 1946, to hear Ribbentrop, Keitel and Lammers, and that Counsel for the accused had not been furnished with the evidence of these witnesses before the close of the preliminary hearing.

The Court of Appeal rejected this plea.

According to the terms of Art. 81 of the *Code de Justice Militaire*, which were applicable to the proceedings of Military Tribunals established in territorial districts in a state of war in virtue of the provisions of paragraph 3 of Art. 179, the accused should have formulated their complaint before the Military Tribunal.

In the absence of such steps the plea could not be brought up for the first time before the Court of Appeal.

(*b*) The Court of Appeal also rejected a plea put forward in two parts, the first by Wagner, Röhn, Schuppel and Gädeke and the second by all the appellants, the plea as a whole being based on an alleged violation of Art. 71, paragraph 1, and Arts. 172 and 179 of the *Code de Justice Militaire*, and Art. 1 of the Ordinance of the 28th August, 1944, relating to the rights of the defence. The first part of the plea claimed that the indictment had not been delivered to the appellants three days at least before the meeting of the Tribunal, along with the text of the law applicable and the Christian names and surnames, professions and residences of the witnesses. The second part of the plea alleged that the order to appear which was delivered to the accused did not contain among the texts of the law applicable that of the Ordinance of 28th August, 1944, despite the fact that such notification was expressly required by the above-mentioned texts and the fact that the Ordinance, which bestowed upon the alleged acts the character of war crimes and furnished the basis for the proceedings and alone provided legal jurisdiction to the French Military Tribunal to try belligerent persons belonging to an enemy nation, was pre-eminently a legal text applicable to the proceedings and which ought therefore to have been notified to the accused.

In its decision on this plea the Court of Appeal laid down that the combined effect of Arts. 172 and 179 of the *Code de Justice Militaire* was that the provisions of Art. 71, paragraph 1, of the same code were not applicable to proceedings held by Military Tribunals established in territorial districts in a state of war. According to Art. 179, an accused ordered to appear

(1) *See* pp. 97-9.

before such a tribunal must, 24 hours at least before the meeting thereof, receive notification of the summons containing the order of convocation of the Court as well as the indication of the crime or delict alleged, the text of the law applicable and the names of the witnesses which the prosecution proposed to produced. The summons was duly notified to the accused on the 6th April, 1946.

It was true that it was maintained that the summons did not make mention of the Ordinance of 28th August, 1944, which gave to the alleged acts the character of war crimes and provided a basis for the jurisdiction of the Military Tribunal, and therefore did not satisfy the requirements of Art. 179 of the *Code de Justice Militaire*. Nevertheless, since the provisions of this article, which were relied upon in the second part of the plea, envisaged only the texts of the law which laid down the penalties applicable to the crimes committed, and since this category did not include the Ordinance of 28th August, 1944, the complaints contained in both parts of this plea were not substantiated.

(*c*) The Court of Appeal had next to decide upon a plea put forward by Wagner, based upon alleged violations of the rights of the defence, and claiming that the Military Tribunal had rejected the arguments of the appellant in favour of hearing further witnesses.

The Court of Appeal recalled that the Military Tribunal had decided on 3rd May, 1946, to reject the arguments of the appellant in favour of hearing several witnesses because it was for the accused to arrange for the appearance of all witnesses whom they judged necessary for their defence. In deciding thus, the Military Tribunal had made an exact application of the provisions of paragraph 3 of Art. 179 of the *Code de Justice Militaire* the language of which was as follows :

" . . . The accused has the right, without formality or previous notification, to arrange for the hearing on his behalf of all witnesses of whom he has notified the Prosecutor before the opening of the proceedings, provided they are present at the hearing."

Therefore the plea was rejected.

(*d*) The court rejected the plea of Röhn, based upon an alleged violation of the rights of the defence, and claiming that the Memoranda of the appellant dated 28th January, 1st June and 14th September, 1943, which had not been submitted as evidence at the preliminary hearing, were made the subject of argument at the main hearing and were used as a basis for the verdict.

The documents referred to in the plea, said the Court of Appeal, appeared in the dossier of the preliminary enquiry and were made the subject of interrogations of the accused Röhn on the 18th June and 5th October, 1945. Furthermore, they had been made the subject of discussion between the parties in the course of the main hearing without the appellant having raised any objection. It followed that the plea must fail.

(iii) *The Alleged Retroactive Application of the Ordinance of 28th August*, 1944

The Court of Appeal had next to decide on a plea put forward by Wagner, based upon the alleged violation of Art. 4 of the *Code Penal* (1) and of the

(1) " No misdemeanour, delict or crime can be punished except by penalties laid down by law before the perpetration thereof."

principle of the non-retroactivity of the criminal law, claiming that the Ordinance of the 28th August, 1944, had been applied against the appellant despite the fact that the Ordinance, which was aimed at punishing acts committed before its promulgation, did not respect Art. 4 and the principle just mentioned.

The judgment of the Court of Appeal recalled that the Ordinance laid down that the crimes and delicts set out in its Art. 1, "which have been committed since the beginning of hostilities," shall be prosecuted before French Military Tribunals and tried in accordance with the French laws in force and with its own provisions. This legal text, duly promulgated, became binding on the Tribunals and could not be questioned before them on grounds of its unconstitutional nature. The plea could not, therefore, be upheld.

(iv) *The Status of Alsace*

Wagner put forward a plea based upon an alleged violation by false application of the Ordinance of 28th August, 1944, claiming that the acts alleged were committed in Alsace, which was annexed by Germany, and on territory over which French sovereignty had ceased to operate.

The purported declaration of annexation of Alsace by Germany on which reliance was placed in the plea was deemed by the Court of Appeal to be nothing more than a unilateral act which could not legally modify the clauses of the treaty signed at Versailles on 28th June, 1919, by the representatives of Germany. Therefore the acts alleged to have been committed by Wagner were committed in Alsace, French territory, and constituted war crimes in the sense of Art. 1 of the Ordinance of 28th August, 1944.

(v) *A Plea based on the Fact that the Judges were not asked whether the Acts charged were Justified by the Laws and Customs of War.*[1]

The Court of Appeal had next to decide on a plea put forward by all appellants and based upon an alleged violation of Arts. 88, 90 and 172 of the *Code de Justice Militaire*, Art. 1 of the Ordinance of 28th August, 1944, and Art. 7 of the Law of 20th April, 1810, and upon an alleged lack of legal basis.

The appellants claimed that, since the prosecution arose out of crimes and delicts committed by persons belonging to an enemy nation and whose acts were of a belligerent nature, the questions put to the military judges should have aimed at making it clear that the alleged crimes were within their competence and should be punished with the penalties laid down in the Ordinance of 28th August, 1944, because they were not justified by the laws and customs of war.

In fact, however, none of the questions put to the military judges had asked whether the acts charged were or were not justified by the laws and customs of war. The silence of the questions on this point resulted in the judges not taking a decision on an essential element of the war crimes alleged against the appellants.

The Court of Appeal pointed out that the war crimes set out in Art. 1 of the Ordinance must, in the language of that Article, be punished by

[1] And *see* pp. 53-4.

French Military Tribunals, in accordance with French law, " when such offences even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."

The effect of these provisions was that justification by the laws and customs of war of the alleged acts would, if established, take away their criminality. Distinct questions regarding the existence of this justifying element were not, therefore, necessary, since they were implicitly included in the questions regarding guilt. It followed that the plea must be rejected.

(vi) *Five Pleas relating to the Application of Provisions of French Law regarding Enrolments on Behalf of an Enemy Power, and relating to Superior Orders.*(1)

The Court then had to decide on pleas put forward by Wagner, Röhn, Schuppel and Gädeke alleging violation of Arts. 75 and 77 of the *Code Pénal* and of Art. 24 of the Law of 29th July, 1881,(2) and failure by the Tribunal to answer Counsel's arguments.

It was pleaded :

(*a*) that the appellants had not been guilty of an infraction of these articles since the first text envisaged only Frenchmen and the second, foreigners, and were not applicable to the appellants who belonged to a country at war with France ;

(*b*) that the Ordinance of 28th August, 1944, did not refer to the articles of the *Code Pénal* set out above ;

(*c*) that the question whether or not the provocation of Frenchmen to bear arms against France had been effective, had not been asked ;

(*d*) that Schuppel and Gädeke, who were simply inferior officials, had only obeyed orders received from their superiors ;

(*e*) and finally that the Tribunal had omitted to answer arguments of Gädeke's Counsel in which he pleaded this justifying circumstance.

Dealing with the first part of the plea, the Court of Appeal pointed out that the first paragraph of Art. 77 of the *Code Pénal* declaring guilty of espionage " any foreigner who commits one of the acts set out in Art. 75, paragraph 4," and which is aimed especially against enrolment for a foreign power at war with France, made no distinction between foreigners coming from an enemy nation and those who do not. Moreover, paragraph 2 of Art. 77, according to the language of which " provocation to permit or proposal to commit one of the crimes set out in Arts. 75 and 76 and by the present article shall be punished in the same way as the crime itself," makes no exception in favour of persons coming from an enemy country.

Therefore, in declaring Wagner, Röhn, Schuppel and Gädeke guilty of having carried out enrolment for a power at war with France and the first three of having encouraged Frenchmen to bear arms against France, the Military Tribunal, far from violating Arts. 75 and 77 of the Criminal Code, on the contrary, made an exact application thereof.

On the second part of the plea, the Court of Appeal laid down that it was of no importance that the infractions mentioned in the plea did not

(1) And *see* pp. 51-4.
(2) *See* p. 53.

appear in the enumeration, contained in paragraph 2 of Art 1. of the Ordinance, of offences which must in particular be punished as war crimes, since this enumeration had not an exhaustive character.

On the third part of the plea, the Court of Appeal recalled that Wagner, Röhn and Schuppel had been accused of offences against Arts. 75 and 77 of the *Code Pénal* for having incited Frenchmen to bear arms against France. In view of the affirmative answers to the questions regarding guilt in this connection, it was in order for the Military Tribunal to pronounce the penalty laid down by the above-mentioned articles.

It was for the defence to request that subsidiary questions should be asked as to whether the provocations alleged had been committed in one of the ways set out in Art. 23 of the Law of 29th July, 1881, and had not had any effect; but no use had been made of this right and consequently Art. 24, paragraph 1, of the said law of 29th July, 1881, had no application in this connection.

On the 4th and 5th items of the plea, the Court of Appeal pointed out that, in connection with each of the infractions of Arts. 75 and 77 of the *Code Pénal*, set out in the charge against Schuppel and Gädeke, the Military Tribunal had been asked whether the accused " had acted under order of his superiors for purposes within the jurisdiction of the latter and on which he owed them obedience due to rank."

The putting of these questions gave satisfaction to the request formulated in the arguments put forward by Gädeke and set out in his plea. Further, the Tribunal had answered in the negative to each of these questions. The answers duly given to these questions were irrevocable. Therefore the plea must fail.

(vii) *The Jurisdiction of the Military Tribunal*[1]

The Court of Appeal had then to decide on the joint pleas put forward on the one hand by Grüner and on the other hand by Röhn and Schuppel, founded upon the alleged violation of Art. 81 of the *Code de Justice Militaire* and of Art. 1 of the Ordinance of 28th August, 1944. They pointed out that the Military Tribunal, in its decision of the 23rd April, 1946, had rejected the arguments based on lack of jurisdiction put forward by Grüner, on the ground that the competence of the Military Tribunal, being based on the Order for Trial, could not be questioned. The appellants pleaded that, according to the terms of Art. 81 of the *Code de Justice Militaire*, the question of lack of jurisdiction could be brought up at any time before the hearing of witnesses, and that the voluntary homicides alleged in the charge against Grüner had been committed on German territory against an English prisoner of war. The terms of the Ordinance of the 28th August, 1944, could not, therefore, be applied in this instance.

In its decision on this plea, the Court of Appeal recalled that the terms of Art. 81 of the *Code de Justice Militaire* stated that " if the accused or the Prosecutor has pleas based on lack of jurisdiction to put forward, such a plea must be put forward before the hearing of witnesses and the submission must be decided upon immediately." The provisions of this article were applicable in proceedings before a Military Tribunal established in territorial districts in a state of war, in virtue of Art. 179, paragraph 3 of the same

(1) And *see* p. 49.

Code. Counsel for Grüner, before the hearing of witnesses, had claimed that the Military Tribunal lacked jurisdiction in view of the fact that the acts had not been committed either in France or in territory under the authority of France or against or to the prejudice of any of the persons mentioned in paragraph 1 of Art. 1, of the Ordinance of 28th August, 1944.

The Military Tribunal in its decision of 23rd April, 1946, had rejected his arguments on the ground that the formal act of sending the case to trial had bestowed jurisdiction on the Tribunal, the Order of Trial had become final in the absence of any opposition and the competence of the Tribunal could not, therefore, be put into question.

The Court of Appeal ruled that in deciding thus, the Military Tribunal had violated the provisions of Art. 81 of the *Code de Justice Militaire.* Moreover the Court of Appeal pointed out that paragraph 1 of Art. 1 of the Ordinance of 28th August, 1944, laid down that:

> " Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a stateless person resident in French territory before 17th June, 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies, shall be prosecuted by French military tribunals and shall be tried in accordance with the French laws in force, and according to the provisions set out in the present Ordinance, where such offences, even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."

The Tribunal's decision of the 3rd May, 1946, stated that Grüner was, by the answers made to the questions Nos. 146 to 153, declared guilty of four acts of voluntary homicide, each specified by questions Nos. 31—38 in the following terms: " Is it proved that on the 7th October, 1944, at Reinweiler (Baden), a homicide was voluntarily committed against the person of an English prisoner of war of unknown address ? " " Did this murder immediately precede, accompany or follow the murder set out in the —th question ? "[1]

The crimes set out in the charge against Grüner were shown by the answers made to the above-mentioned questions to have been committed in Germany against the persons of soldiers of an Allied army and were not among those which, according to the terms of the Ordinance of 28th August, 1944, could be prosecuted before French Military Tribunals and tried according to French laws.

It followed that, in applying to Grüner provisions of the said Ordinance, the decision which was challenged violated these provisions and had no legal basis.

Finally, since the Military Tribunal had answered in the negative the question whether Röhn and Schuppel were accomplices to the crime of voluntary homicide committed by Grüner, the accused were without interest in making a complaint based on the violation of the law on which reliance

[1] *See* pp. 97 and 99.

was placed in the plea. Accordingly, the plea in so far as they were concerned could not be received.

There was, according to the Court of Appeal, no need to decide on the plea put forward by Gädeke based on an alleged violation of Art. 60 of the *Code Pénal*, concerning complicity in the acts of premeditated murder specified in questions 1—28 of which he had been declared guilty by the answers to questions 118-144, since the penalty inflicted upon him was legally justified having regard to the dispositions of Arts. 75 and 77 of the *Code Pénal*, which was aimed at punishing the crime of recruiting for the benefit of a foreign power, and the provisions of Art. 411 of the *Code d'Instruction Criminelle.*

(viii) *The General Outcome of the Appeal*

For the reasons set out above the Court of Appeal rejected the appeals lodged by Wagner, Röhn, Schuppel and Gädeke and condemned them collectively to pay costs.

The Court quashed the ruling of 23rd April, 1946, which rejected the arguments of Grüner based on lack of competence, together with the judgment of 3rd May, 1946, as far as it related to Grüner.

Since the acts contained in the charge against Grüner did not fall within the jurisdiction of the existing French Courts, the Court stated that a reference back for re-trial was not possible and that Grüner was to be freed if he was not detained for another reason or required by an Allied authority.(1)

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE TRIBUNAL AND ITS JURISDICTION

The Tribunal was convened by virtue of the French Ordinance of 28th August, 1944, Concerning the Prosecution of War Criminals.(2)

Art. 177 of the *Code de Justice Militaire*, on which the Tribunal relied when rejecting the arguments of Grüner's Counsel in making his plea to the jurisdiction of the former, includes the following passage:

> " If the *juge d'instruction* . . . is of the opinion that the act charged constitutes an offence within the military jurisdiction he shall refer the accused for trial to a Military Tribunal, Article 68 not being applicable. . . ."

Article 68 lays down the exclusive authority of the Indictments Division (*Chambre des mises en accusation*) of the Court of Appeal to commit cases to a Military Tribunal for trial.(3)

The Court of Appeal, however, ruled that an accused was, despite the provisions of Art. 177, still entitled, under Art. 81(4), to question the jurisdiction of the Tribunal at any time before the hearing of witnesses. The

(1) Grüner was subsequently handed over to the British Authorities for trial by British Military Court (which has jurisdiction to try all war crimes committed against Allied victims). Grüner succeeded in escaping on the eve of his trial and at the date of going to press of this Volume he had not been recaptured.
(2) *See* p. 93.
(3) *See* p. 97.
(4) *See* p. 47.

Court of Appeal went on to state that the Tribunal had in fact been without jurisdiction to try Grüner, whose crimes were committed in Germany against Allied prisoners and were therefore outside the scope of Art. 1 of the Ordinance of 28th August, 1944.(1)

As will be seen, Grüner could properly have been tried by a Military Government Tribunal in the French Zone of Germany.(2)

One word may be added regarding the reliance placed by the Tribunal on the fact that Art. 68 of the *Code de Justice Militaire* was inapplicable in war time.

At the time of the trial (April, 1946), fighting between France and the ex-enemy countries had ceased. The question whether, under International Law, in view of the fact that no treaty of peace had been signed with Germany, the war against Germany must still be regarded as being in progress, is, however, of no relevance to provisions of municipal law such as Art. 68 of the *Code de Justice Militaire.* Each country is free to appoint, for its own internal legal purposes, an official date at which the war is to be deemed to have ended. For the French legal system, the date so appointed was 1st June, 1946, for that of the United States, 31st December, 1946.(3) On the other hand, the British Government has taken the view that, no treaty of peace or declaration of the Allied Powers terminating the state of war with Germany having been made, the United Kingdom is still in a state of war with Germany, although, as provided in the Declaration of Surrender of 5th June, 1945, all active hostilities have ceased. (*R.* v. *Bottril, ex parte Küchenmeister* [1946] 1 All England Reports, p. 635).

2. PRISONERS OF WAR RIGHTS NOT GRANTED TO PERSONS ACCUSED OF WAR CRIMES

It is a recognised rule that a person accused of having committed war crimes is not entitled to the rights in connection with his trial laid down for the benefit of prisoners of war by the Geneva Prisoners of War Convention of 1929.(4) An interesting corollary is provided by the decision of the French Court of Appeal that Wagner was not entitled to the rights provided for a prisoner of war *under French Law.*(5)

3. THE CHARGES AGAINST THE ACCUSED

Article 1 of the Ordinance makes certain persons punishable for breaches of French law in respect of specified persons and property, provided that their acts are not justified by the laws and customs of war.(6)

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(1) *See* p. 48.

(2) *See* p. 101.

(3) President Truman, in a proclamation on 31st December, 1946, announced with immediate effect the official termination of hostilities of the Second World War. At a news conference he pointed out that his proclamation did not officially end the state of emergency proclaimed by President Roosevelt in 1939 and 1941 nor formally end the state of war itself, and that such action could only be taken by the U.S. Congress. The termination of hostilities meant the immediate ending of 20 war-time statutes, and the cessation of 33 others within six months.

(4) *See War Crime Trial Law Reports,* Vol. I, pp. 29-31 and also a Report on the trial of General Yamashita by a United States Military Commission, to be contained in Volume IV of this series.

(5) *See* pp. 2-3.

(6) *See* p. 94.

In the Wagner trial the legal provisions describing the offences which the accused were alleged by the Prosecution to have committed, were those contained in Arts. 75, 77, 295, 296 and 297 of the *Code Pénal* and in the Ordinance of 28th August, 1944. It is interesting to examine these in turn.

(*a*) Art. 77 of the Code provides that any foreigner who commits any of the acts referred to in Art.75 (2), (3), (4) and (5) and in Art. 76 thereof shall be guilty of espionage and punished by death.

Provocation to commit, or proposal to commit, one of the crimes set out in these paragraphs of Art. 75, or in Arts. 76 or 77 itself, shall also be punished as espionage.

The only provision referred to in Art. 77 which is relevant to the present discussion is the following paragraph from Art. 75 :

> " 75. The following shall be guilty of treason and punished with death :
>
> . . . . . .
>
> " (4) Any Frenchman who, in time of war, incites soldiers or sailors to pass into the service of a foreign power, facilitates such an act, or carries out enrolments for the benefit of a power at war with France."

These provisions were the basis of the charges of inciting Frenchmen to bear arms against France which were made against Wagner, Röhn and Schuppel.

(*b*) Article 114 of the *Code Pénal* provides that :

> " Whenever a public official, an agent or an officer of the Government, orders or commits an arbitrary act against, or attempt against, individual liberty, the civic rights of one or more citizens, or the Constitution, he shall be sentenced to civic degradation.
>
> " If, however, he pleads that he acted under orders of his superiors for objects which were within their province, and concerning which he owed them obedience due to rank, he shall be exempt from punishment, which shall be applied only to the superiors who gave the order."

It will be recalled that Wagner was charged with attempts against individual liberty. It should be noted that under Art. 35 of the *Code Pénal* the penalty of " civic degradation " must, in the case of an alien, be accompanied by a sentence of imprisonment for a term not exceeding five years.

(*c*) The remaining three Articles of the *Code Pénal* which were referred to in the *Act d'Accusation* and in the judgment of the Tribunal, as describing the alleged offences, were as follows :

> " 295. Homicide committed voluntarily is called murder.(1)
>
> " 296. Murder committed with premeditation or by foul play(2) is called premeditated murder.(3)

(1) In the French, " meutre."
(2) In the French, " guet-apens."
(3) In the French, "assassinat." The term " murder " and " premeditated murder " are used throughout these pages as signifying " meutre " and " assassinat." No closer equivalents are available ; for instance, if " assassinat " were translated as " murder," then " meutre " would have to be rendered as perhaps " manslaughter," whereas such a translation would be inexact.

" 297. Premeditation consists of forming a plan, before the act, to make an attempt against the person of a specific individual, or of anyone who may be found or encountered, even if the plan should depend on the existence of some circumstances or the fulfilment of some condition."

It will be recalled that Hugo Grüner was charged with having committed premeditated murder, and Wagner, Röhn, Schuppel, Gädeke, Luger, Semar and Huber with having been accomplices thereto. (As to complicity, *see* p. 17.)

(*d*) Reference was also made to the Ordinance of 28th August, 1944.

Article 2(1) thereof states that illegal recruitment of armed forces, as specified in Art. 92 of the *Code Pénal*, shall include all recruitment by the enemy or his agents. The provisions of Art. 92 are as follows:

" Whoever raises armed forces or causes them to be raised, or engages or recruits soldiers, or causes them to be engaged or recruited, or furnishes them with or procures for them arms or munitions, without the orders or permission of a lawful authority, shall suffer death."

These provisions would provide a basis for the charges against Wagner, Röhn, Schuppel and Gädeke, alleging recruitment for the benefit of a foreign power at war with France.

Art. 2(4) of the Ordinance provides that:

" Premeditated murder, as specified in Art. 296 of the *Code Pénal* shall be interpreted to include killing as a form of reprisal."

Art. 2 (5) of the Ordinance states that: " Illegal restraint, as specified in Arts. 341, 342 and 343 of the *Code Pénal* shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced."

The wording of Art. 341 is as follows:

" With the exception of cases in which the law orders the seizing of accused persons, whoever arrests, detains or sequestrates any person without the order of the constituted authority, shall be punished with a term of penal servitude."

" Whoever affords a place for carrying out the imprisonment or sequestration shall undergo the same penalty."

Arts. 342 and 343 set out the circumstances in which sentences of penal servitude for life, or imprisonment for from two to five years may be delivered for the commission of this offence.

These provisions would provide the basis for the charge of attempts against individual liberty, brought against Wagner.

Art. 23 and the first paragraph of Art. 24 of the Law of 29th July, 1881, on the liberty of the Press, on which a plea was based by Wagner, Röhn, Schuppel and Gädeke, run as follows:

" *Art.* 23. Anyone who by speech, shouts or threats uttered in public places or meetings, either by writing or printed matter sold or distributed, placed on sale or displayed in public places or meetings, or by placards or posters displayed to the public eye, has directly provoked the author

or authors to commit an act defined as a crime or a delict, if the provocation has been effective, shall be punished as an accomplice in that act. This provision shall apply also when the provocation has only resulted in an attempted crime, as defined in Art. 2 of the *Code Pénal.*

Art. 24. Anyone who by any of the means set out in the preceding Article has directly provoked anyone to theft, murder, pillage, arson or one of the crimes or delicts made punishable by Arts. 309 and 313 of the *Code Pénal*, or one of the crimes made punishable by Art. 435 of the *Code Pénal*, or one of the crimes or delicts provided against by Arts. 75 to 85 inclusive of the same code, shall be punished, where this provocation has not been put into effect, by from one year to five years' imprisonment and a fine of from 1,000 to 1,000,000 francs. . . ."

As has been seen,(1) the Court of Appeal ruled that Counsel for Wagner, Röhn and Schuppel should have requested that a subsidiary question be put to the judges of the Military Tribunal asking whether the accused came within the terms of Article 24, but, since they had failed to do so, that Article had no application to the case.

Art. 88 and 90 of the *Code de Justice Militaire*, to which reference was made by the Defence in connection with their plea based on the fact that the judges were not asked whether the acts charged were justified by the laws and customs of war,(2) make the following provisions, regarding the questions which the President of a Military Tribunal must or may put to the judges thereof; they elucidate also the plea of the Defence, based on Arts. 23 and 24 of the Law on the Freedom of the Press, referred to in the last paragraph:

" *Art.* 88. The President shall ask the questions arising out of the Indictment and the proceedings in Court which must be put to the Judges.

" He may also, acting *ex officio*, put to them subsidiary questions, if the proceedings have shown that the principal act can be considered either as an offence punishable by a different penalty or as a crime or delict under the general law; but in this case he must declare his intentions in public sitting before the closing of the proceedings, in order to put the public prosecutor, the accused and his Counsel, in a position to give their observations in due course.

" *Art.* 90. The questions shall be put by the President in the following order for each accused:

" (1) is the accused guilty of the act of which he is charged?

" (2) was this act committed in such and such aggravating circumstances?

(3) was this act committed in such and such circumstances which make it excusable according to the law?

. . . . . "

The investigation attempted in the previous paragraphs of the specific offences which the accused were alleged to have committed and of various provisions of French law relied upon by both Counsel and the Tribunal is of value, since it illustrates French state practice in the matter of war crimes,

(1) *See* p. 47.
(2) *See* p. 45.

as do also, for instance, the provisions relating to the defence of superior orders, to be discussed later The emphasis placed on breach of provisions of French law and defences based upon the same law does not signify, however, that the accused were not tried also for offences against the laws and customs of war. The French practice is merely an example of the prevailing continental approach to war crimes and their punishment, according to which the accused must be shown to have committed some breach of municipal law which was at the same time *not justified by the laws and customs of war.* In many trials of alleged war criminals by French Military Tribunal, the judges are specifically asked whether the acts proved against the accused were justified by the laws and customs of war. The Court of Appeal had to decide upon a plea based upon the fact that this step had not been taken in the Wagner Trial, and ruled that it was not necessary that the Judges should be asked this specific question, because Art. 1 of the Ordinance of 28th August 1944, made it clear that the legality of an accused's acts under the laws and customs of war would render him not guilty of an offence. It was not, therefore, necessary to ask the judges whether this element of justification existed.

4. THE DEFENCE OF SUPERIOR ORDERS

Wagner occasionally referred to orders he had received from Hitler. All other accused claimed to have acted on orders from Wagner, either in the latter's capacity as Head of the Civil Administration or as Gauleiter. Only in Luger's case, however, was the plea of superior orders successful in securing an acquittal.

The Judgment of the Tribunal states that Luger was acquitted in virtue of Art. 3 of the Ordinance, which lays down broadly that superior orders, while they " cannot be pleaded as justification within the meaning of Art. 327 of the *Code Pénal,*" may, in suitable cases, be pleaded as an extenuating or exculpating circumstance.

Art. 327 of the *Code Pénal* provides :

> " No crime or delict is committed when the homicide, wounding or striking was ordered by the law or by legal authority."

The Judges answered in the affirmative the question whether, in committing the acts proved against him, Luger had "acted under the orders of his superiors, for objects which were within their province, and concerning which he owed them obedience due to rank." On the other hand, whenever the Judges were asked whether any of the other accused had acted under similar circumstances, their answers were in the negative.

The Prosecution, and the Tribunal, made reference, in the *Acte d'Accusation* and in the judgment respectively, to Art. 114 of the *Code Pénal,* and, in view of the wording of Art. 3 of the Ordinance, it is interesting to examine the former provision.(1)

The first paragraph thereof states that any public official who has ordered or committed an arbitrary act against, or an attempt against, individual liberty, the civic rights of one or more citizens, or the Constitution, shall suffer civic degradation. The second paragraph, however, states that if he

(1) *See also* earlier in these notes, p. 51.

pleads that he acted under the orders of his superiors, for objects which were within their province, and concerning which he owed them obedience due to rank, he shall not suffer this punishment, which shall be applied only to the superiors who gave the order.

The similarity between the wording of this second paragraph and that of the question put to the Judges whether Luger acted under superior orders (*see above*) is evident. The position seems to be that the defence of superior orders, when pleaded in war crime trials before French Military Tribunals, does not constitute an absolute defence such as is envisaged in Art. 327, but that circumstances similar to those described in the second paragraph of Art. 114 may constitute an extenuating or exculpating circumstance. It is left to the Tribunal to decide in each case, whether and to what extent the plea is to be heeded.(1).

(1) *See* Michel de Juglart, *Répertoire Méthodique de la Jurisprudence Militaire.* (Paris, 1946), pp. 242-5.

CASE No. 14

Trial of GUNTHER THIELE and GEORG STEINERT

UNITED STATES MILITARY COMMISSION, AUGSBERG, GERMANY, 13TH JUNE, 1945.(1)

A. OUTLINE OF THE PROCEEDINGS

The accused, a German army lieutenant and grenadier respectively, were charged with a violation of the Laws of War. The specification against Thiele alleged that he " did, at or near Billingsbach, Germany, on or about 17th April, 1945, wrongfully and unlawfully order that ....., an American prisoner of war, be killed, which order was then and there executed by a member of his command." It was alleged that Steinert " did, at or near Billingsbach, Germany, on or about 17th April, 1945, wrongfully and unlawfully kill " the same named prisoner of war. Both pleaded not guilty.

It was shown that a United States officer was wounded and taken prisoner by members of the command of Lieutenant Thiele. Captain Schwaben, the battalion commander and superior officer of Lieutenant Thiele, sent an order to Lieutenant Thiele to kill the prisoner. Lieutenant Thiele then ordered Grenadier Steinert to do the killing, and Grenadier Steinert carried out this order. The accused were, at the time of the offence, part of a German unit which was closely surrounded by United States troops, from whom the Germans were hiding.

The accused were sentenced to death by hanging. On the recommendation of his Staff Judge Advocate, however, the appointing authority commuted the sentences to terms of imprisonment for life.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE COMMISSION

This trial, like the following two annotated in the present document, was held before the promulgation by order of General Eisenhower of the directive regarding Military Commissions in the European Theatre of Operations of 25th August, 1945.(2) In respect of the present trial, the authority to appoint the Military Commission was delegated by the Commanding General, European Theatre of Operations, to the Commanding General, 12th Army Group, by letter dated 19th November, 1944, with power of redelegation. This power was delegated by the Commanding General, 12th Army Group, to the Commanding General, Seventh United States Army, by letter dated 21st May, 1945. In the first letter authority was given to the Commanding Generals, Sixth and Twelfth Army Groups, to

(1) This report and the following three contained in this Volume are based not on complete transcripts of the trials, which were not available to the Secretariat of the United Nations War Crimes Commission, but on trial summaries furnished by the United States authorities.

(2) *See* Annex III, p. 105.

appoint Military Commission for the trial of persons subject to the jurisdiction of such commissions who were " charged with espionage or with such violation of the laws of war as threaten or impair the security of their forces, or the effectiveness and ability of such forces or members thereof." By a radio message from the Commanding General, Seventh Army, to the Commanding General, 12th Army Group, dated 4th June, 1945, the facts of this case were stated and the opinion was expressed that they came under the provisions set out above in that they were acts that threatened or impaired the security of United States forces, or the effectiveness and ability of those forces or members thereof. Advice was given in the same way of the intention to try this case and concurrence was requested to this and similar trials. Authority to hold the trial was then given.

2. CONFIRMATION OF SENTENCES

Paragraph 12 (Review) of the European directive of 25th August, 1945, provides that :

"(*a*) Every record of trial by military commission will be referred by the appointing authority to his staff judge advocate for review before he acts thereon.

"(*b*) Every record of trial in which a death sentence is adjudged, if such sentence is approved and not commuted by the appointing authority, will be forwarded to the Deputy Theatre Judge Advocate, War Crimes Branch, this headquarters, APO 757, for review by the Theatre Judge Advocate or his deputy and presentation with appropriate recommendations to the confirming authority for action."

The first three United States trials dealt with in the present volume[1] all took place before the promulgation of the directive of August 25th, 1945, but in each case a review of the proceedings was submitted to the appointing authority by his Staff Judge Advocate and before a death sentence was carried out a further review was prepared by the Deputy Theatre Judge Advocate for the Commanding General, European Theatre of Operations.

3. THE LEGAL NATURE OF THE OFFENCE

The acts of the accused were in violation of Art. 2 of the 1929 Geneva Prisoners of War Convention and of Art. 23 (*c*) of the Hague Convention No. IV of 1907. These run as follows :

" *Art.* 2. Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.

" They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity."

" Measures of reprisal against them are forbidden."

" *Art.* 23. In addition to the prohibitions provided by special Conventions, it is particularly forbidden :

(*c*) To kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion."

(1) *See* pp. 56-64.

4. THE DEFENCE OF SUPERIOR ORDERS

The Defence, in putting forward the plea of superior orders on behalf of both accused, quoted Section IV, paragraph 47, of the *Deutsches Militaerstrafgesetzbuch* (German Military Penal Code):

> " (1) If in the execution of an order relating to Service matters a penal law is violated, the commanding officer is solely responsible. Nevertheless, the subordinate obeying the order is subject to penalty as accomplice: 1. If he transgressed the order given, or 2, if he knew that the order of the commanding officer concerned an action the purpose of which was to commit a general or military crime or misdeameanour.
>
> " (2) If the guilt of the subordinate is minor, his punishment may be suspended.'

The law relating to the plea of superior orders has already been discussed in Volumes I and II of this series.(1) It will suffice here to point out that the plea was rejected by the Commission, but that, on the recommendation of his Staff Judge Advocate, the Commanding General, 7th United States Army, commuted the sentences to imprisonment for life.

5. THE DEFENCE OF MILITARY NECESSITY

The accused raised the defence that their acts were legal because based on military necessity. The Court, however, rejected this plea.

On this point, Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), pages 183-4, states:

> " As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects. In accordance with the German proverb, *Kreigsraeson geht vor Kriegsmanier* (*necessity in war overrules the manner of warfare*), many German authors before the World War were already maintaining that the laws of war lose their binding force in case of extreme necessity. Such a case was said to arise when violation of the laws of war alone offers, either a means of escape from extreme danger, or the realization of the purpose of war—namely, the overpowering of the opponent. This alleged exception to the binding force of the law of war was, however, not at all generally accepted by German writers. . . The proverb dates very far back in the history of warfare. It originated and found recognition in those times when warfare was not regulated by laws of war, i.e., generally binding customs and international treaties, but only by usages (*Manier*, i.e., *Brauch*). . . . In our days, however, warfare is no longer regulated by usages only, but to a greater extent by laws—firm rules recognized either by international treaties or by general custom. These conventional and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self preservation. . . Art. 22 of the Hague

(1) Volume I, pp. 16-20 and 31-33; and Volume II, p. 152.

Regulations stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity. What may be ignored in the case of military necessity are not the laws of war, but only the usages of war."

The accused in this case had violated the laws of war as expressed in solemn treaty obligations and, therefore, the doctrine of military necessity was no defence.

CASE No. 15

Trial of PETER BACK

UNITED STATES MILITARY COMMISSION, AHRWEILER, GERMANY. 16TH JUNE, 1945

A. OUTLINE OF THE PROCEEDINGS

It was charged that Peter Back, a German civilian, " did, at or near Preist, Germany, on or about 15th August, 1944, violate the laws and usages of war by wilfully, deliberately and feloniously killing an American airman, name and rank unknown, a member of the Allied Forces, who had parachuted to earth at said time and place in hostile territory and was then without any means of defence." He pleaded not guilty.

It was shown that the accused had shot an unarmed airman who had been forced to descend by parachute on to German territory. The Commission passed a sentence of death. The Army Judge Advocate recommended that the sentence be approved, but execution stayed pending further orders.

B. NOTES ON THE CASE

1. LEGAL BASIS OF THE COMMISSION

Like the last trial, the present proceedings were held by virtue of powers redelegated by the Commanding General, 12th Army Group, in this instance to the Commanding General, 15th United States Army.

2. THE NATURE OF THE OFFENCE

The accused was charged with " wilfully, deliberately and feloniously killing " an American airman ; this phraseology is in part reminiscent of that used in the charge in the *Jaluit Atoll Case*,(1) and approximates to the definition of murder in United States Law as " the unlawful killing of a human being with malice aforethought."

The accused admitted the killing, but pleaded that he committed it on the " spur of the moment," and that he had no intention of killing. Nevertheless, the Commission found him guilty of a deliberate killing. In this connection, it must be remembered that in United States Law (as in English Law) it is not necessary that the intention to kill " should have been conceived for any particular period of time. It is as much premeditation if it entered into the mind of the guilty agent a moment before the act as if it entered ten years before."(2) In the words of another authority, "a man who wantonly, intentionally and violently kills another shows by that act, not indeed the existence of hatred of long standing, but the existence of deadly hatred, instantly conceived and executed ; which is at least as bad, if not worse. This, in the strict sense of the words, is malice aforethought," though " not long aforethought."(3) In this case, the rapidity with which the execution followed the forming of the intent did not reduce the degree of the crime, which was treated as murder.

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(1) *See* Volume I of this series, pp. 71-80.
(2) Wharton, *Criminal Law*, 12th Edition, Volume I, Sec. 507.
(3) Stephen. *Digest of Criminal Law*, 5th Edition, Art. 244 (*a*).

A subsequent assault by two others, hastening the death of the victim, did not relieve Back of guilt. " Liability for homicide does not depend upon the fact that death is the immediate consequence of the injury inflicted by the accused. One who inflicts an injury is deemed by the law to be guilty of homicide if the injury contributes to the death. If two persons inflict wounds at different times . . . (and) if at the moment of death it can be said that both injuries are contributing thereto, the responsibility rests on both actors. In such cases the law does not measure the effects of the several injuries in order to determine which contributed in greater degree to bring about the death."[1]

The accused was a civilian, and his conviction is further proof that civilians as well as combatants are liable to be brought before war crimes tribunals accused of breach of the laws and usages of war.[2]

3. MADNESS AS A DEFENCE

There was some evidence that the accused was known at times to act without thinking, but the report of a neuro-psychiatrist, who examined him a few days before the trial, stated that he was sane. The entry of this latter evidence is an interesting indication that the defence that madness deprived the accused of the requisite *mens rea* might have been considered admissible in a war crime trial had it been put forward.

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[1] *American Jurisprudence*, Homicide, Sec. 48.
[2] *See also* Volume I of this series, pp. 53-4 and 103.

CASE No. 16

Trial of
ALBERT BURY and WILHELM HAFNER

UNITED STATES MILITARY COMMISSION, FREISING, GERMANY, 15TH JULY, 1945

A. OUTLINE OF THE PROCEEDINGS

Bury, ex-police chief of Langenselbod, Kreis Hanau, Germany, and Hafner, ex-policeman in the same place, were accused of unlawfully killing a United States prisoner of war. It was alleged that the former accused delivered the prisoner to the latter, with instructions to kill him, and that Hafner carried out these orders. The airman was taken to a secluded spot and shot. Bury stated that he had orders that "terror flyers" were no longer to be granted the protection of prisoners of war and were to be killed by lynching or beating and that the police were not to protect " terror flyers " if the populace lynched them. Both accused were sentenced to death by hanging and the sentences were confirmed.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE COMMISSION

The proceedings again were based upon a delegation by the Commanding General, 12th Army Group, of the power to hold war crime trials, delegated to him by the Commanding General, European Theatre of Operations.

2. RULES OF PROCEDURE

The trial was held before the promulgation of the European directive,[1] but basic provisions regarding procedure similar to those set out therein were made for these proceedings. In the Special Order appointing the Commission, power was granted to it to make such rules for the conduct of the proceedings, consistent with the powers of a Military Commission, as were deemed necessary for a full and fair trial. The Order further provided that the Commission was not bound by the rules of procedure and evidence prescribed for General Courts Martial, but such evidence was to be admitted as had probative value to a reasonable man. In paragraphs 2 and 3 of the European directive it was subsequently provided:

> " Military commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such commissions, and with the rules of procedure herein set forth, as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for general courts martial. . . . Such evidence shall be admitted before a military commission as, in the opinion of the President of the commission, has probative value to a reasonable man."

[1] *See* p. 56.

In the present trial, the Commission announced at the outset that its proceedings were to " be governed generally by the rules of procedure and evidence as laid down in the Manual for Courts Martial with the following changes. Statements made by the accused in the course of investigations which appear to be regularly and properly authenticated will be admitted in evidence, subject to such attack as the accused may desire to make. The statements made by the accused that are admitted in evidence will be received generally against all of the accused subject to such rebuttal as the accused or any of them may elect to make. The accused will be accorded the same privileges with regard to testifying as are accorded accused persons in trials before American Courts Martial, but if the accused or any of them elect to take the stand as an unsworn witness, he will be subject to cross-examination. If the accused elects to remain silent, the fact may be the subject of all reasonable inferences and comments."

It will be noted that the rule giving effect to the extra-judicial statements of one accused against another was different from that prevailing in Courts Martial. In paragraph 76, the *Manual for Courts Martial, U.S. Army*, provides: " The accused, whether he has testified or not, may make an unsworn statement to the court in denial, explanation, or extenuation of the offences charged, but this right does not permit the filing of the accused's own affidavit. This statement is not evidence, and the accused cannot be cross-examined upon it, but the prosecution may rebut statements of fact therein by evidence. Such consideration will be given the statement as the court deems warranted. The statement may be oral or in writing, or both. . . . If the statement made by an accused himself includes admissions or confessions, they may be considered as evidence in the case, but in a joint trial the statement by one accused is not evidence against his co-accused. . . ." Paragraph 114 (*c*) states: " . . . The fact that a confession or admission of one conspirator is inadmissible against the others does not prevent the use of such confession or admission against the one who made it, but any such confession or admission cannot be considered as evidence against the others. The effect of an unsworn statement made by one of several joint offenders at the trial is likewise to be confined to the one who made it. . . ." (1)

The remaining provisions of the *Manual* which were rendered inapplicable to the present proceedings are those contained in paragraphs 77 and 121 (*b*). Paragraph 77, *inter alia*, states: "The failure of an accused to take the stand must not be commented upon; . . ." In so far as an accused became liable to cross-examination *even if unsworn*, a departure was made also from paragraph 121 (*b*), which provides that: " . . . An accused person taking the stand *as a witness* becomes subject to cross-examination like any other witness. . . ." (2)

3. THE NATURE OF THE OFFENCE

The offence was said to be a breach of the Hague Convention No. IV, Arts. 4 and 23, and of the Geneva Prisoners of War Convention, Arts. 2 and 3.

(1) Regarding the question of the admissibility of evidence by one accused against another in the Belsen trial, held by a British Military Court, *see* Volume II, pp. 134-5.

(2) Italics inserted. In British war crime trials, by contrast, where an accused chooses not to appear as a witness on oath, he may make an unsworn statement, on which he is not subject to cross-examination. (Rules of Procedure 40 and 41.)

Art. 4 of the Hague Convention provides :

" Art. 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated. . . ."

Art. 3 of the Geneva Convention states :

" Art. 3. Prisoners of war are entitled to respect for their persons and honour. . . ." (1)

4. THE DEFENCE OF SUPERIOR ORDERS

The plea of superior orders was raised on behalf of both accused, but the Commission rejected it.

It is worthy of note that his own testimony showed that Bury had some latitude in determining whether or not any specific flyer should be killed. He received no explicit order with respect to the victim, and there was nothing to show that the haste and callousness with which the American flyer was dispatched was made necessary by the circumstances. Hafner is not recorded as having made any protest against the order. When he reported to Bury that the job was done, Bury replied, " It is right so."

It is not proposed to examine at length the law relating to superior orders in war crimes cases.(2) It would be permissible, however, to relate to the facts of the case the opinion of an authority on International Law not so far quoted on the present topic in these Volumes.

Glück, seeking to reconcile the dilemma in which a subordinate is placed by an order manifestly unlawful, compliance with which may later subject him to trial for a war crime, and refusal to comply with which may immediately subject him to disciplinary action, perhaps death, suggests that the following rule be applied : " An unlawful act of a soldier or officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he actually knew, or, considering the circumstances, he had reasonable grounds for knowing that the act ordered is unlawful under (*a*) the laws and customs of warfare, or (*b*) the principles of criminal law generally prevailing in civilized nations, or (*c*) the law of his own country. In applying this rule, whenever the three legal systems clash, the last shall be subordinate." (3) It is clear that the conduct of the accused in the present case was unlawful under the laws and customs of warfare and equally so under principles of criminal law prevailing in civilized nations, and it seems that Glück's test was satisfied, involving as it does the objective factor of reasonableness " considering the circumstances."

(1) For Article 2 of the 1929 Convention and Article 23 (*c*) of the 1907 Convention, *see* pp. 57-8.
(2) *See* the references set out on p. 58.
(3) Glück, *War Criminals, Their Prosecution and Punishment*, pp. 155-156.

CASES Nos. 17 and 18

Trials of ANTON SCHOSSER, and of JOSEF GOLDBRUNNER and ALFONS JACOB WILM

UNITED STATES MILITARY COMMISSIONS AT DACHAU, 14-15TH AND 17TH SEPTEMBER, 1945

A. OUTLINE OF THE PROCEEDINGS

The three accused were charged with a violation of the Laws of War, in that they, " German civilians, did, at or near Moosinning, Germany, on or about 20th July, 1944, wilfully, deliberately and wrongfully encourage, aid, abet, and participate in the killing of " a named United States airman, an unarmed prisoner of war.

It was alleged that the airman had been shot by Schosser and his body thrown into a canal by two and perhaps all three accused. Schosser was sentenced to death on 15th September, 1945. This sentence was confirmed and put into effect.

The trial against the remaining two accused was severed and on 17th September, 1945, they were tried and acquitted. Schosser admitted that he had lied at his trial, confessed to the killing and exonerated Goldbrunner and Wilm.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE COMMISSIONS

In both trials the appointment of the Commission and its proceedings were governed by the directive regarding Military Commissions in the European Theatre of Operations of 25th August, 1945, to which reference has already been made.(1)

In the first trial, each member of the Military Commission disqualified himself from the ensuing trial of Goldbrunner and Wilm and another military commission was appointed to try the remaining two accused. Paragraph 1, sub-paragraph (*c*) (Composition) of the directive simply provides that:

> " Military commissions shall be composed of not less than three commissioned officers of the United States Army. There shall also be appointed a trial judge advocate and defence counsel."

Paragraph 2 (Rules of Procedure), however, states that: " . . . The provisions of Section VII, paragraphs 38-47, War Department FM 27-5, subject: " Military Government and Civil Affairs," dated 22nd December, 1943, are designed as a general guide in this field and will be followed except as amended by this letter or other instructions of this headquarters." Sub-paragraph (*a*) (Military Commissions) of paragraph 40 (Composition) of War Department FM 27-5 contains the following provision: " . . . In

(1) *See* p. 56.

general, the rules for army or navy general courts martial will serve as a guide in determining the compositions of military commissions, including the designation of law members, trial judge advocates, and necessary assistants. . . ."

The appointment of a new Commission for the second trial would seem, therefore, to be an application to a war crime trial of the provisions of paragraph 70 (*b*) of the *Manual for Courts Martial, U.S. Army*: " . . . Where, as a result of action on a motion to sever, trial of one or more accused is deferred, the facts will be reported at once to the appointing authority by the trial judge advocate in order that such authority may take appropriate action with a view to the trial of such accused by another court, or other disposition of the charges as to such accused."

2. THE SEVERANCE OF TRIALS

Upon a motion by Counsel for all accused, the Commission granted a severance of trial as to accused Alfons Jacob Wilm and Josef Goldbrunner. While the exact nature of the defence expected to be interposed by Goldbrunner and Wilm was only hinted at in the statements of Defence Counsel and in their affidavit testimony, it appeared that they would attempt to blame Schosser for the murder, and that their defence would therefore be almost diametrically opposed to his. The same Defence Counsel could not, therefore, adequately represent both Schosser and the two other accused in the same trial. As a result of the severance it became correct for Goldbrunner and Wilm to appear in the witness box among the witnesses for the Prosecution against Schosser.[1]

[1] *See* Volume II, pp. 6-7, for an application for separate trials in the Belsen Trial, and *ibid.*, pp. 134-5, regarding evidence by one accused against another.

CASE No. 19

Trial of ERICH KILLINGER and four others

BRITISH MILITARY COURT, WUPPERTAL, 26TH NOVEMBER-3RD DECEMBER, 1945

A. OUTLINE OF THE PROCEEDINGS

Erich Killinger, Heinz Junge, Otto Boehringer, Heinrich Eberhardt and Gustav Bauer-Schlightergroll, former officers of the Luftwaffe, were charged with " committing a war crime in that they at or near Oberursel, Germany, between 1st November, 1941 and 15th April, 1945, when members of the staff of the Luftwaffe Interrogation Centre known as Dulag Luft, in violation of the laws and usages of war were together concerned as parties to the ill-treatment of British Prisoners of War." All pleaded not guilty.

The Prosecution claimed that the accused belonged to the German Air Force Interrogation Centre at Oberursel, near Frankfurt. This Centre was known to the German Air Force authorities as Auswertestelle West, but, more widely as Dulag Luft. The function of Dulag Luft was, shortly, to obtain information of an operational and vital nature from the captured crews of Allied machines. The allegation was that excessive heating of the prisoners cells took place at Dulag Luft between the dates laid in the charge for the deliberate purpose of obtaining from prisoners of war information of a kind which under the Geneva Convention they were not bound to give, and that the accused were concerned in that ill-treatment. The Prosecution also alleged a " lack of and refusal of required medical attention " and " in some cases, blows." At first the Prosecutor also claimed that the methods used included prolonged solitary confinement and threats of delivery of the prisoner of war to the Gestapo and of shooting by the Gestapo, "on the basis that the prisoner of war might, because he did not answer sufficiently fully, be a saboteur." After a consultation with one of the Defence Officers, however, the Prosecutor withdrew the last two allegations.

Killinger, Junge and Eberhardt were found guilty and sentenced to imprisonment for five, five and three years respectively. The remaining two accused were found not guilty. The sentences were confirmed by higher military authority.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE CHARGE

The Prosecutor rested his case on the Geneva Prisoners of War Convention of 1929, and in particular Arts. 2 and 5. Art. 5 reads as follows :

> " Art. 5. Every prisoner of war is required to declare, if he is interrogated on the subject, his true names and rank, or his regimental number. If he infringes this rule, he exposes himself to a restriction of the privileges accorded to prisoners of his category.
>
> " No pressure shall be exerted on prisoners to obtain information regarding the situation of their armed forces or their country. Prisoners

who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever.

"If, by reason of his physical or mental condition, a prisoner is incapable of stating his identity, he shall be handed over to the Medical Service." (1)

Pointing out that the prisoners who passed through Dulag Luft appeared to have had no exercise while there, Counsel quoted Art. 13 of the Convention:

". . . They shall have facilities for engaging in physical exercises and obtaining the benefit of being out of doors."

During his closing address, one of the Defence Counsel made three submissions regarding the scope of the Convention. The first was that under the Geneva Convention interrogation was not unlawful. The second was that to obtain information by a trick was not unlawful, under the same Convention. The third point was that to interrogate a wounded prisoner was not in itself unlawful unless it could be proved that that interrogation amounted to what could be described as physical or mental ill-treatment. The Court expressed its agreement with these three principles.

It will be noticed that the charge alleged that the accused "were together concerned as parties to the ill-treatment of British Prisoners of War." In connection with this part of the charge the Prosecutor quoted Paragraph 8 (ii) of the Royal Warrant:(2)

"Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court."

During the hearing of the closing addresses for the Defence, the Legal Member of the Court asked the Prosecutor what his attitude would be if the commandant of a prisoner-of-war camp, although completely ignorant of the ill usage of prisoners of war, was negligent in his supervision of his subordinates. Would the Prosecutor say that that made him a party to the ill-treatment, or would he say that in order to make a person a party he must be guilty of more than negligence, and must at least come within the category of an aider and abettor as that phrase is commonly known to English criminal law? The Prosecutor submitted that a man might be concerned as a party either through intention, where "malice—a designed plan—" was present, or through neglect so acute that the established standards of English criminal law would apply. The standard of negligence would have to be of such a degree that it was considered criminal, gross, flagrant, "or those other strong terms with which our English law books are familiar." He agreed with the Legal Member when the latter claimed that the only

(1) For Article 2 *see* p. 57.

(2) *See* Annex I, *British Law Concerning Trials of War Criminals by Military Courts*, on pp. 105-110 of Volume I of this series.

standard of neglect in accordance with English criminal law which would make a man guilty of a crime of a major nature was the neglect necessary to prove manslaughter, in other words, a recklessness and a complete disregard of the situation. Later during the hearing of the closing of the case for the Defence, the Legal Member announced that the Court had come to a decision on the interpretation of the phrase " were concerned together as parties to the ill-treatment of British prisoners of war." The Court had agreed that no amount of mere negligence, however gross, could bring a person within the category of a party as defined in the particulars of the charge ; that the word " parties " must of necessity mean that the person concerned must have had some knowledge of what was going on and must have deliberately refrained from stopping such practice ; and that the person, in order to be a party, must come within the category of a principal in the second degree or aider and abettor in the ill-treatment alleged. The words " aider and abettor " and " principal in the second degree " would have the same meanings as in the ordinary criminal law of England. One of the Defence Counsel claimed that there had been no suggestions by the Prosecution, and no evidence, that there was a plan, a method of treatment, and that it was the usual habit or custom of Dulag Luft, as a unit, to perpetrate this treatment. The Prosecutor, in his closing address, argued that each accused was concerned, in his respective capacity on the staff of Dulag Luft, as a party to the ill-treatment of prisoners of war, and concerned with sufficient proximity to make him criminally responsible on the ordinary standards of criminal responsibility in English law, either by being an accessory before the fact, or a principal in the second degree, or a principal in the first degree, or an accessory after the fact. The only difference between the " ordinary tests of responsibility " set out in English Criminal Law and the law to be applied in the present trial lay in Regulation 8 (ii) which Counsel regarded as a " matter of evidence." It was submitted by the Prosecution that, on the balance of the evidence, Regulation 8 (ii) was in point and that the evidence regarding one accused might be treated as evidence against another.

The *Yamashita Trial*,[1] conducted by a United States Military Commission, contains, *inter alia*, some interesting material on the liability of a Commander for War Crimes committed by his subordinates. On the question of liability for mere inaction, reference should be made to the *Essen Lynching Case*.[2] There a German guard was sentenced to imprisonment for five years for failing to intervene while Allied prisoners of war, under his care, were lynched. The question of joint responsibility received some attention in that case, but much more in the *Belsen Trial*.[3] There it was generally agreed that before Regulation 8 (ii) could operate against an accused, it must have been proved that he knowingly took part in a common plan to commit a war crime. An analogy was drawn between the words " concerted action," contained in the Regulation and the legal concept of conspiracy. In the Dulag Luft Case, while the Prosecution argued that Regulation 8 (ii) was relevant, the Court in its ruling was careful to explain the charge wholly in terms of the law relating to parties to a crime (mentioning specifically principals in the second degree, that is to say, aiders

(1) To be reported in Volume IV of the present series.
(2) Volume I of the present series, pp. 88-92.
(3) Volume II, pp. 138-41.

and abettors) without referring to Regulation 8 (ii). It therefore remains possible to assume that a prior conspiracy to commit a war crime must be proved before Regulation 8 (ii) can become effective, and that it is not enough to show that certain accused acted as aiders and abettors.

2. DE MINIMIS NON CURAT LEX

After referring to an exaggerated newspaper account of the offences alleged in the trial one of the Defence Counsel made the following comment:

> " The mere use of the words ' war criminal ' conjures up that sort of idea in people's minds, and I am sure that the Court will agree with me when I say that this Court was not convened to punish minor irregularities or infringements of international conventions such as have occurred in every country during six and a half years of the most disastrous war that history has ever known."

3. THE SCOPE OF REGULATION 8 (i) OF THE ROYAL WARRANT

Regulation 8 (i) of the Royal Warrant begins with the following words:

> " At any hearing before a Military Court convened under these Regulations the Court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court Martial, and without prejudice to the generality of the foregoing in particular:

Six rules are then set out in clauses (*a*) to (*f*) as examples of this general statement, and Regulation 8 (i) ends with the words:

> " It shall be the duty of the Court to judge of the weight to be attached to any evidence given in pursuance of this Regulation which would not otherwise be admissible."

After presenting the oral evidence against the accused, the Prosecutor expressed his intention to put in certain affidavits, relying on clause (*a*) of Regulation 8 (i), which reads as follows:

> " (*a*) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the Court, unable so to attend without undue delay, the Court may receive secondary evidence of statements made by or attributable to such witness."

The Prosecutor reminded the Court that he was limiting his allegations to those concerning over-heating, refusal or delay of medical attention and, in some cases, blows. Some of the details in the affidavits (concerning solitary confinement, threats and low diet) fell outside the scope of these allegations but it was not always easy to dissect the documents and read only what was relevant.(1)

(1) In the Belsen Trial (*see* Volume II of this series, pp. 131-3), there were disputes as to the admissibility of certain evidence contained in affidavits. It was pointed out by the Prosecutor that Military Courts were judges both of law and fact and that it was evitable therefore that, in cases of disputes as to admissibility, the Court must, in their former capacity, read an affidavit or have it read to them to decide whether to admit it, and then, if it is to be admitted, weigh its value, acting in their latter capacity. He claimed that Regulation 8 (i) had been framed deliberately to avoid time-wasting disputes as to admissibility of evidence, and to allow the Court simply to decide, after hearing all the evidence, what weight it would place on it. In the Dulag Luft Case, the interpretation of the Prosecutor in the Belsen Trial seems to have been tacitly approved and followed.

Among the documentary evidence for the defence appeared part of a B.B.C. War Report which had been referred to in an affidavit. Both were authenticated by a Commissioner for Oaths.

Clauses (*b*) and (*e*) of Regulation 8 (i) were invoked by the Prosecutor in tendering as evidence a dated " form of affidavit " completed by a named Lieutenant in the United States forces who described himself as " C. E., Post Engineer," and a dated minute from the United States Deputy Theatre Judge Advocate in London. These clauses run as follows:

> " (*b*) Any document purporting to have been signed or issued officially by any member of any Allied or enemy force or by any official or agency of any Allied, neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof."
>
> " (*e*) The Court may receive as evidence of the facts therein stated any diary, letter or other document appearing to contain information relating to the charge."

4. THE RELATIVE VALUE OF AFFIDAVIT EVIDENCE

Before the tendering of the affidavit evidence for the Prosecution, the Defence applied for one deponent to be produced in person. The Defence had been given to understand that the British Officer in question would be available for questioning. The Court decided, after hearing argument, that the deponent could not be produced " without undue delay " (in the wording of Regulation 8 (i) (*a*)), and the President of the Court added the significant statement that " we realise that this affidavit business does not carry the weight of the man himself here, as evidence, and when it is read we will hear what objections you have got to anything that the affidavit says, and we will give that, as a Court, due weight." The President's words may fairly be taken as a reference to the fact that if evidence is given by means of an affidavit the person providing the evidence is not present in Court to be examined, cross-examined and re-examined.

5. STATEMENTS MAY BE PUT IN WITHOUT PROOF OF VOLUNTARY NATURE

During the discussion of the same application the Legal Member asked Counsel for the Defence whether, if an affidavit had been taken by duress (supposing that allegation were made), it would nevertheless be admissible. Counsel agreed that the Defence would be barred from objecting in law to its admission on the ground that the statement was not a voluntary one. The Legal Member then advised the Court that when and if any of the accused were to give evidence in explanation of the giving of their statements, it was relevant and very important that they should tell the Court what their version of the taking of those statements was, and the Court would then decide as to how it affected the veracity of those statements. (It was later revealed that the objection of the Defence was that the statement was pieced together as a result of a series of interrogations which lasted over several days, and that the substance of the statement was obtained by question and answer.)

In the trial of Eberhard Schöngrath and six others[1] the Legal Member advised the Court that it was empowered to receive a written statement,

[1] To be reported in full in a later Volume in the present series.

even though no caution had been administered, provided the Court was satisfied that the statement was made voluntarily. In the Belsen Trial the accused Aurdzieg pleaded that a confession by him which was placed before the Court was not made voluntarily. The Prosecutor, however, countered this argument by pointing out that below the accused's signature appeared an account and description by Aurdzieg of the persons who were working with him.(1) Speaking of the affidavits of Irma Grese, the Prosecutor submitted that the provisions regarding the cautioning of accused had no application in Military Courts. It was not necessary for the Prosecution to satisfy the Court that Grese's were voluntary statements. The Royal Warrant was drawn up with the deliberate intention of avoiding legal arguments as to whether evidence was admissible or not. They were drawn widely to admit any evidence whatsoever and to leave the Court to attach what weight they thought fit to it when they had heard it. By " authentic " was signified " genuine." The Judge Advocate said that the affidavits were not, in his view, analogous in any way to the statements or documents which came under Rule of Procedure 4 in the case of a Field General Court Martial.(2)

The result seems to be that the Defence cannot prevent a statement from being put in as evidence by denying its voluntary nature, but is free to attack the weight to be placed on it. In practice, therefore, the Court will always ascertain whether or not a statement is made voluntarily in order to assess its evidential value. This conclusion seems to be supported also by a ruling of the Court in the trial of Hans Renoth and Three Others.(3)

6. SIGNIFICANCE OF AFFIDAVIT EVIDENCE IN RELATION TO RULES OF PROCEDURE 40 (C) AND 41 (A)

The British Royal Warrant provides in Regulation 3 that, except in so far as therein otherwise provided, the Rules of Procedure applicable in a Field General Court Martial of the British Army shall be applied so far as applicable to the Military Courts for the trial of war criminals. These rules are contained in the British Army Act and the Rules of Procedure made under the Act by an Order in Council, the latter being a piece of delegated legislation enacted by the Executive in 1926 (S.R. & O. 989/1926).

Counsel for Eberhardt indicated that the only evidence which the accused intended to call, apart from going into the witness box himself, was evidence by affidavit. Whereupon the Legal Member advised the Court that evidence given by affidavit was " evidence apart from the accused himself." It would therefore cause Counsel to lose the last word in the case from the point of view of addressing the Court. It was also evidence which entitled him, if he wished to open his case before he called his evidence.

In delivering this advice, the Legal Member was making tacit reference to Rules of Procedure 40 (C) and 41 (A) which run as follows :

> " (C) If the accused states that he wishes to give evidence as a witness himself but does not intend to call any other witness to the facts of the case, the procedure, whether or not he is represented by counsel or by an officer subject to military law, will be as follows :

(1) *See* Volume II, pp. 68 and 116.
(2) *See* Volume II, pp. 135-6.
(3) To be reported in a later volume in the present series.

(i) The accused will give evidence immediately after the close of the evidence for the prosecution.
(ii) The accused may, if he wishes, call witnesses as to his character.
(iii) The prosecutor may then make a final address for the purpose of summing up the evidence for the prosecution and commenting on the evidence of the accused.
(iv) The accused or counsel or the defending officer (as the case may be) may then make a closing address in his defence."

" 41 (A). If the accused states that he wishes to give evidence himself and to call witnesses to the facts of the case, the procedure whether or not he is represented by counsel or by an officer subject to military law, will be as follows :

(i) The accused or, if he is represented by counsel or by a defending officer, then such counsel or defending officer may make an opening address for the defence.
(ii) The accused will give evidence as a witness, and call his other witnesses, including, if he so desires, witnesses as to character.
(iii) After the evidence of all the witnesses has been taken, the accused or counsel or the defending officer (as the case may be) may make a closing address.
(iv) The prosecutor may reply."

These provisions, intended primarily for District Courts Martial, are made applicable, " so far as practicable " to Field General Courts Martial (and so to Military Courts) by Rule 116, which states :

" 116. Where during the course of a trial any doubt arises as to the procedure to be followed in connection with the calling or recalling or questioning of witnesses, or the order in which such witnesses are to be examined and addresses are to be made by the prosecutor or by or on behalf of the accused, the provisions of the foregoing rules relating thereto shall, so far as practicable, apply as if the field general court-martial were a district court martial."

7. POSSIBILITY OF A SECOND RE-EXAMINATION OF WITNESSES

During the hearing of the evidence for the accused, the Defence stated that, while they fully understood that, in accordance with Rule of Procedure 85 (A), the Court or any Member might address a question to a witness, the questions put to the witnesses for the defence by the Court had been, in their submission, in the nature of a lengthy cross-examination. In view of this the Defending Officers asked that they might be granted a right of re-examination at the conclusion of such questioning. The Legal Member advised the Court that there was not right by either Rule of Procedure or by the Royal Warrant for Defending Officers to re-examine their witnesses after the Court or any Member of the Court has asked any questions. There was an inherent right in any Member of a Court to ask any questions he thought fit. It was, however, always at the discretion of a Court to give the Defending Officer an opportunity of asking questions about any new matter which had not already been brought up either by the Prosecution or the Defence and which had been introduced as a result of the questions of any Member of the Court. The President of the Court ruled that, should

any Member of the Court submit a witness to a thorough re-examination, the Defence would be given a chance to re-examine.

Rule of Procedure 85 (A), to which reference was made provides that:

> " 85 (A). The president, the judge-advocate (if any) and, with permission of the court, any member of the court may address a question to a witness while such witness is giving his original evidence and before he withdraws."

This provision also falls within the scope of Rule 116, quoted above.

8. RIGHT OF COUNSEL TO CALL HIMSELF AS WITNESS

Before calling evidence on behalf of Bauer, his Counsel applied for permission to appear himself in the witness box, if necessary, to give evidence on the way in which he came into possession of certain documents which he wished to enter. The Legal Member suggested that the Counsel should call his other evidence first and that if there was then any matter which was not plain from that evidence, Counsel would have a perfect right to call himself as a witness and to give evidence on oath concerning the circumstances in which certain matters came into his knowledge, if such a matter was relevant to the defence. Counsel subsequently went into the box to describe how he had collected certain documents from the accused's wife at his home.

9. WITNESS ALLOWED WRITTEN MEMORY AIDS

A witness for the Prosecution was allowed by the Court, in describing a building, to refer to notes made during his visit to the building.(1)

On the other hand in the Belsen Trial, the defence witness Gertrud Neumann was found to have in her possession, while in the witness box, a typewritten copy of a statement which she had previously made to Counsel defending one of the accused. The Prosecutor protested that: " What we want to hear is the witness's recollection and not something from a typewritten statement." The Court ruled that witnesses should give their spontaneous recollection and should not refresh their memories from any document. Similarly, in the trial of Major Karl Bauer and six others,(2) Counsel for Bauer applied to the Court for permission for that accused, in giving evidence to " use certain notes of evidence and statements which he wishes to make." Raür had assured Counsel that he had made the notes during the course of the trial. The Judge Advocate, however, said that it was " unusual for a witness to have notes in the witness box," and advised the Court that " he should not be provided with notes unless some specific point arises."

10. THE QUESTION OF TRANSLATIONS OF EVIDENCE

Presumably since they were ex-members of an interrogation centre the accused all had a knowledge of English. The Court, after receiving a

(1) This is an illustration of the rule described on pp. 89-90 of the British *Manual of Military Law* which states: " A witness may not read his evidence or refer to notes of evidence given by him, but he may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court consider it likely that the transaction was at that time fresh in his memory. . . ."

(2) To be reported in full in Volume IV of the present series.

reassurance on the point from the Defence, permitted the non-translation of the oral evidence from English into German, while at the same time stating that a translation would be provided should any accused ask for it.(1)

(1) For further discussion on the question of translations of evidence, *see* Volume I of this series, pp. 65-66, and Volume II, p. 145.

CASE No. 20

Trial of YAMAMOTO CHUSABURO

BRITISH MILITARY COURT, KUALA LUMPUR, 30TH JANUARY-1ST FEBRUARY, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused, a sergeant in the Imperial Japanese Army, was charged of having committed a war crime " in that he at or about 2300 hours on 12th September, 1945, at Kuala Lumpur contrary to the laws and usages of war killed one Omar a civilian resident of Kuala Lumpur." The accused admitted killing a Malaya civilian, Omar, who, he claimed, had stolen rice from the army stores, but pleaded, *inter alia*, that he acted in self-defence and under the influence of alcohol. The Court found him guilty and sentenced him to death by hanging, but with a recommendation for mercy. The sentence was, however, confirmed and put into effect.

B. NOTES ON THE CASE

1. THE NATURE OF THE CRIME ALLEGED

In his opening address, the Prosecutor said that action which resulted in death and which was not justified or accidental was, in English law, murder or manslaughter according to the circumstances. He submitted that whatever degree the killing might happen to be in this case, in reaching a decision as to whether the accused was guilty or not guilty, the court need not concern itself with the question of malice, the ingredient necessary to constitute murder. If the court thought Yamamoto had committed an unlawful act and that that act had resulted in death then the court might find him guilty on the charge. Nevertheless it might well be that the court would find evidence of malice sufficient to make the offence murder, and no doubt all such indications in the evidence would be taken into account if and when the court considered any question of punishment.

This submission that, on a charge of killing, it need not be proved that an alleged war criminal had committed murder as defined by English law is reminiscent of the advice rendered by the Legal Member in the *Essen Lynching Case*, to the effect that a charge of killing in a war crime trial was not one of murder, that is to say of a " killing of a person under the King's peace." (1)

The Prosecutor went on to state that the alleged offence took place at a time when, although open hostilities had ceased, the Japanese were still armed and in control of certain areas " pending the consummation by surrender of their capitulation." War did not end with the mere cessation of hostilities, and any violation of the Laws and Usages of War committed during the process of surrender and disarming was as much a war crime as one committed at the height of battle ; all the more so if the act was a breach of the terms of the convention for capitulation.

(1) *See* Volume I of this series, p. 91.

It was stated in evidence that the body of Omar was exhumed on the 13th September, 1945, only one day after the killing, " on the orders of a British officer." It will be remembered that, in the *Scuttled U-boats Case*,(1) an accused was sentenced to a term of imprisonment for an offence committed even after the conclusion of an Instrument of Surrender, indeed for an act in breach thereof.

2. THE DEFENCES OF DRUNKENNESS, SELF DEFENCE, SUPERIOR ORDERS, PROVOCATION AND ALLEGED LOSS OF CIVILIAN STATUS BY THE VICTIM

The accused confessed to the killing of Omar, but pleaded that a number of circumstances should be considered as constituting defences. The evidence of the accused which is referred to in the following two paragraphs will be seen in effect to constitute the pleading of the five defences of drunkenness, self-defence, superior orders, provocation and loss of civilian status by the victim.

In pre-trial statements, he admitted that he had no instructions to kill or injure anyone stealing property. His proper duty would have been to take the offenders to his superior officers. He stated, however, that, finding himself attacked by eight or nine Chinese and Indians, he was compelled to retaliate in self-defence. He continued : " I borrowed the sentry's bayonet because I thought I was going to be killed. If I had not seized the bayonet I would have been helpless against the crowd. I wish to admit that I was under the influence of alcohol when I killed this man. I had strict orders from Colonel Imamura to guard the rice in the storehouse, which was due to be turned over to the British forces on their arrival in Kuala Lumpur."

In a plea in mitigation of sentence, entered during the trial,(2) the accused claimed that prior to the day of the incident in question several cases of looting by civilians of military stores were reported. He was particularly forewarned by his officer, Major Oba, to be extra vigilant against civilian looters. After the news of the Japanese surrender on 14th August, 1945, the looters became more daring and desperate. They raided with impunity places under Japanese control. On 12th September, 1945, at about 11 p.m., he heard a sentry raise an alarm. It was pitch dark then and the accused " rushed out almost half awake." He detected a group of Chinese and Indians wheeling away hand-carts loaded with sacks. He chased them and managed to arrest Omar, the deceased. At this time a collection of men had gathered around. A few of them started tugging at the accused in an endeavour to free Omar. A few others were hostile in their behaviour. Guided by a sudden impulse and obsessed by the thought of grave danger to life and property he momentarily lost control over himself and in a rage killed Omar with a bayonet. Pitch darkness around him aggravated his fears. He had an honest belief in the existence of grave danger to his own life though it might now seem that he had exceeded his powers by resorting to killing. The accused also pleaded that, having looted military stores Omar had forfeited his right of protection as a citizen under the Laws and Usages of War.

In his closing address, the Prosecutor replied to all of the arguments put forward by the accused with the exception of that concerning superior orders.

(1) *See* Volume I, pp. 55-70.

(2) In fact contained in a document put in as evidence for the defence and agreed to by the accused. Since he had not then been found guilty, the use of the term " plea in mitigation of sentence " to describe this statement was, strictly speaking, incorrect.

It will have been noted that the accused did not claim that he had orders to kill persons attempting to raid the stores.

The Prosecutor said that he could find no foundation in law for the suggestion that Omar had lost his status as a civilian because he looted. His comment was that: "If in fact Omar did loot then no doubt Omar committed a war crime for which he could be tried and legally punished if the charge were proved. As the accused said in his first statement, ' My proper duty would have been to take the offenders to my superior officers.' "

On the defence of drunkenness, the Prosecutor said that drunkenness in itself was not an excuse for crime, but where intention was of the essence of the offence, drunkenness might justify a court in awarding a lesser punishment than the offence would otherwise have deserved or it might reduce the offence to one of a less serious character. In such a case the man must be in such a state of drunkenness as to make him incapable of formulating any intention to commit the offence, and such a state would clearly affect the degree of killing of which the Court would find the accused guilty.

The Prosecutor submitted that to affect intention provocation must be great. It must be such as might reasonably be expected to put an ordinary person not of an exceptionally passionate disposition into such a passion that he would lose his power of self-control, and that state must be sufficient to reduce a murder to manslaughter (1). It must be clearly established in all cases where provocation was put forward as an excuse that at the time when the crime was committed the offender was actually so completely under the influence of passion arising from the provocation that he was at that moment deprived of the power of self-control. It would be necessary to consider carefully all the circumstances showing the state of mind of the accused including the manner of the killing, the weapon used and the time between the provocation and the killing.

The Prosecutor further pointed out that there was evidence that the act was not committed in defence of property or person, while Omar was in the process of looting ; it was committed after Omar had been taken from his house into custody.

The reasoning by which a British Military Court arrives at its verdict and sentence cannot be discovered, since its discussions are arrived at in private sitting and only the final decisions announced. The arguments of Counsel are of interest, however, in so far as they throw light on considerations which the Court may have had in mind during their deliberations. In strict law, even the summing up of a Judge Advocate, when one is appointed (as was not the case in the present trial), is not a final indication even of the law on which the Court acted. Two relevant provisions setting out some of the powers and duties of the Judge Advocate are made by Rule of Procedure 103 (*e*) and (*f*), which run as follows:

> " (*e*) At the conclusion of the case he will, unless both he and the court consider it unnecessary, sum up the evidence and *advise* (2) the court upon the law relating to the case before the court proceed to deliberate upon their finding ;

(1) As to the attempted division of killing as a war crime into murder and manslaughter, *see* p. 76.

(2) Italics inserted.

" (*f*) Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not disregard it, except for very weighty reasons. *The court are responsible for the legality of their decisions,*[1] but they must consider the grave consequences which may result from their disregard of the advice of the judge-advocate on any legal point. The court, in following the opinion of the judge-advocate on a legal point, may record that they have decided in consequence of that opinion."

From these clauses it follows that, strictly speaking, the Court is the final judge of the law as well as of the facts of a case, and that a Judge Advocate's summing up does not necessarily set out the law on which the Court acted, although in practice his words carry a very high authority.

The Court, in the trial under consideration, would appear to have considered that there were mitigating circumstances in the case, since they made a recommendation for mercy. The sentence of death was, however, confirmed by higher military authority, and therefore the defences raised must be regarded has having been rejected. Of these defences, only that of superior orders has commonly been raised in trials of alleged war criminals.

Art. 43 of Section III (*Military Authority over the Territory of the Hostile State*) of the Hague Convention No. IV provides that:

" The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country."

Even had the laws of the territory in question, before its occupation, provided the death penalty for stealing from army stores, it would not have been within the competence of a sergeant to perform the function of judge as well as executioner. Further, it could hardly, on the facts of the case, be said that Omar had put himself into that category of war criminals which is referred to in Oppenheim-Lauterpacht, *International Law*, Sixth Edition Revised, Volume II, at p. 454:

" Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces, and the enemy has, according to a customary rule of International Law, the right to treat such individuals as war criminals. But they cease to be private individuals if they organise themselves in a manner which, according to the Hague Convention, confers upon them the status of members of regular forces."

The stealing of rice from a military store could not be regarded as taking up arms and committing hostilities.

The remaining defences, those of drunkenness, self-defence and provocation, are based essentially on the plea that the necessary guilty intention (*mens rea*) was not present in the mind of the accused when he committed the alleged offence. The references made to these defences constituted

[1] Italics inserted.

further examples of the introduction of Municipal (in this case English) Law concepts into a trial where breach of International Law is alleged.(1) It would not therefore be irrelevant to explain a little further the position in English law.

An authoritative declaration of the law as to intoxication was given in 1920 by the concurrence of eight law lords in *Director of Public Prosecutions* v. *Beard* [1920] A.C. 479, where the following rules were laid down:

(*a*) Merely to establish that the man's mind was so affected by drink that he more readily gave way to some violent passion forms no excuse;

(*b*) If actual insanity supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. . . . Insanity, even though temporary, is an answer;

(*c*) Where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime.

Under the third rule, drunkenness, if incompatible with the indispensable mental element of the crime, " negatives the commission of that crime." Thus a drunken man's inability to form an intention to kill, or do grievous bodily harm may reduce his offence from murder to manslaughter (which requires no *specific* intent).

A defence witness, a lieutenant in the Japanese dental corps, in answer to questions by the Court, testified that the accused did drink liquor but was not a heavy drinker and did not get drunk easily. No further evidence was taken on the point.

It is clear that in English law a man is justified in using force against an assailant in defence of himself, provided the force is proportionate to the reasonable apprehension of danger, even if the death of the assailant results. It is also undisputed that gross provocation may reduce murder to manslaughter. As the Prosecutor pointed out, the provocation must be so great as to deprive a reasonable man of his self-control (*Rex* v. *Lesbini* [1914] 3 K.B. 1116). In point of fact, two Prosecution witnesses stated that there was only one other person accompanying the victim at the time of the alleged offence.

Even had the defences of drunkenness and provocation been taken into account by the Court, this fact would not necessarily have had any effect on the verdict and sentence, since the relevance of the distinction between murder and manslaughter in connection with war crimes is disputed.(2)

(1) *See* p. 60; and pp. 79-80 of Volume I of this series.
(2) *See* p. 76.

ANNEX I

NORWEGIAN LAW CONCERNING TRIALS OF WAR CRIMINALS

I. THE BASIC PROVISIONS

The necessary starting point for a study of Norwegian law relating to the trial of war criminals is the Law of December 13th, 1946, (No. 14) on the Punishment of Foreign War Criminals, the text of which differs only in one respect(1) from that of a Provisional Decree on the same subject dated 4th May, 1945. In promulgating the Provisional Decree, the Norwegian Government in London acted in accordance with the resolution adopted by the Storting at Elverum on 9th April, 1940, (2) and with Art. 17 of the Norwegian Constitution, which provides that: " The King may make or repeal decrees concerning commerce, customs, trade and industry, and police ; they must not, however, be at variance with the Constitution or the laws passed by the Storting. . . . They shall operate provisionally until the next Storting." The Law was passed by the Storting on 12th December, 1946, and was given royal assent on 13th December, 1946.

In recommending to the Storting the enactment of this law, the Norwegian Ministry of Justice and Police issued a detailed explanatory memorandum. While it is not claimed that such a document has more than the degree of significance usually attaching to *travaux préparatoires* and official commentaries, it has been thought relevant and of interest to make several references thereto in the course of this Annex.(3)

The procedure of the Courts trying alleged war criminals is governed by the terms of Law No. 2, of 21st February, 1947 (*see* p. 87).

II. THE NORWEGIAN LEGAL APPROACH TO WAR CRIME TRIALS

The Norwegian attitude towards the treatment of war criminals follows the general Continental practice by stressing that, before punishment of any individual offender becomes legal, he must be shown to have offended against some specific provision of Norwegian municipal law as well as against the laws and usages of war. Similarly, when a French Military Tribunal tries an alleged war criminal, the usual practice is for the judges to decide first whether a provision of the French Criminal Code has been violated and, only secondly, whether this breach was justified by the laws and customs of war.(4) By contrast, while it is true that certain instruments having validity in the respective municipal legal systems have always provided in general terms that British Military Courts and United States Military Commissions shall have jurisdiction to try alleged war criminals, the practice of these Courts and Commissions is to stress that a breach of the laws and

(1) *See* p. 89.
(2) This resolution gave the Norwegian Government full power to take any steps and to make any decisions which they might find necessary under war-time conditions.
(3) *See* pp. 82 *ff*. It will have been noted that Judges Skau and Holmboe, in the course of their judgments in the Trial of Hermann Klinge, referred to the explanatory memorandum in determining the intention of the authors of the Law (*see* pp. 3, 6 and 7).
(4) *See also* pp. 53-4.

usages of war must be shown(1); provisions of municipal law are often quoted, as analogies, by counsel, and in British trials by the Judge Advocate or Legal Member, but the violation of any set of legal rules other than the laws and usages of war need not be shown.

The Norwegian approach is shown in the first sentence of Art. 1 of the Law of 13th December, 1946: " Acts which, by reason of their character, *come within the scope of Norwegian criminal legislation* are punishable according to Norwegian law, if they were committed in Norway or were directed against Norwegian citizens or Norwegian interests."(2)

The commentary of the Ministry of Justice and Police claims that this attitude is the same as that adopted in the Moscow Declaration, which provided that war criminals other than major criminals were to be tried and punished in accordance with the laws of the liberated countries. The Ministry, quoting Art. 96 of the Constitution: " No one may be convicted except according to law, or be punished except according to judicial sentence . . . ," then goes on to state that: " Norwegian courts can only inflict punishment according to provisions of Norwegian civil or military law. The principle laid down in Art. 96 of the Constitution must be interpreted in this connection so as to make an arbitrary application of an undefined provision of international law inadmissible. In Norway, international law is not incorporated into national law as an integral part, as in the case of various foreign legal systems. Before a rule of substantive international law can be applied by Norwegian Courts, it must be incorporated into Norwegian national law by a special act. A clear example of this is Art. 92 of our military criminal code, which fixes the punishment for a typical war crime committed by enemy soldiers. The paragraph is based on the international regulations which are to be found in the Geneva Convention of 1929, regarding the treatment of sick and wounded; *cf.* Art. 23 of the Hague Regulations."

It is to be noted, however, that a Norwegian Court is not precluded from sentencing a war criminal to death by the fact that the municipal enactment enabling the supreme penalty to be exacted for his offence was not passed until after the commission thereof. Accordingly, judgment went against Karl Hans Hermann Klinge when he appealed to the Supreme Court of Norway against his being condemned to death as a war criminal by the Eidsivating Lagmannsrett. Counsel for Klinge claimed that the Lagmannsrett had unjustly applied the Provisional Decree of 4th May, 1945; as the crimes for which the defendant had been convicted had been committed before the passing of that Decree, the punishment should have been restricted to the limits set by Arts. 228, 229, and 62 of the Civil Criminal Code, according to which the death sentence could not have been passed; his argument was based on Art. 97 of the Norwegian Constitution, which provides that: " No law may be given retroactive effect." For various reasons

(1) For instance the British Royal Warrant of 14th June, 1945 (Army Order 81/45) as amended provides the basis for trials of alleged war criminals by British Courts, but does not define the crimes to be tried beyond saying that the term " war crime " means " a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939." *See* Volume I of this series, pp. 105-110.

(2) Italics inserted.

already set out,(1) a majority of the Supreme Court judges rejected these arguments.

III. THE DEFINITION OF A WAR CRIME

Art. 1 in full of the Law reads as follows :

" Acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punishable according to Norwegian Law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian citizens or Norwegian interests. In accordance with the terms of the Civil Criminal Code, Art. 12, paragraph 4, with which should be read Art. 13, paragraphs 1 and 3, the above provision applies also to acts committed abroad to the prejudice of Allied legal interests or to interests which, as laid down by Royal proclamation, are deemed to be equivalent thereto."

The provisions of the Civil Criminal Code quoted in the text set out above run as follows :

" Art. 12. Norwegian Criminal Law, except when otherwise specified or laid down by agreement with a foreign country, is applicable to acts which have been committed . . .

(4) abroad by a foreigner when the act either

"(*a*) is included among those dealt with in the following Arts. of this law : (Here follow a series of Article numbers) ; or,

"(*b*) is a crime which is also punishable according to the municipal law of the country in which it was committed provided that the defendant's temporary or permanent domicile is Norway.

" Where the punishability of the act is dependent on or influenced by an actual or premeditated result, the act is considered to have been committed both where the act was actually committed and where the result took place or was intended to take place.

" Art. 13. The prosecution of crimes mentioned in Art. 12 (4) can only be carried out according to Royal decision.

. . . . . .

" Whenever a person is prosecuted in Norway for an act for which he has already been prosecuted in another country, the punishment already suffered must, as far as possible, be deducted from the new term of punishment."

According to the Ministry's memorandum, the expression used in the law : " enemy citizens or other aliens who were in enemy service or under enemy orders " signify mainly " persons employed by the German civil administration, the military and the police." The memorandum continues : " The Decree also applies to German civilians who have been admitted to Norway during the occupation and who have used their special status in a criminal way. The same applies to foreigners regardless of nationality, who

(1) *See* pp. 3 *et seq.*

have voluntarily entered the country in order to work in German public or private enterprises. Foreign slave labourers and Allied prisoners of war or internees naturally do not come under the Decree."

The Ministry stated that the reference to Allied legal interests had been included in the proposed law in order to make it clear that it would be within the competence of Norwegian Courts, where desirable, to try alleged war criminals for offences against the laws and customs of war committed in Allied countries.

The Ministry also explained that the reference to interests to be deemed equivalent to Allied legal interests envisaged in particular Danish citizens and their economic interests, and neutral citizens in Norwegian or other Allied armed forces or employed in other Allied war work.

There are very few provisions in Norwegian criminal law directly and specifically concerned with foreign war criminals. The great majority of the offences which could be punished as war crimes are, in their nature, covered by clauses of the Norwegian civil and military criminal codes having general application. There can be no doubt, claimed the Ministry, " that an execution carried out as means of reprisal constitutes murder (Art. 233 of the Civil Criminal Code). It is equally clear that the employment of prisoners of war or civilians as living buffers against enemy forces can be classified as murder, manslaughter, inflicting bodily injury, etc. Collective fines (contrary to the Hague Regulations), requisitioning, confiscation and the like must be regarded as robbery. Any employment of prisoners of war or civilians contrary to the regulations of international law, illegal conscription for forced labour, internment, deportation, etc., are to be regarded as illegal deprivation of freedom."

The Ministry maintained, however, that: " The German economic exploitation of Norway stands in this respect in a class by itself. Its scale and the forms in which it has been carried out lie in some respects so far beyond the usual conception of criminal law that it is difficult or even impossible to regard the different acts as being within the scope of existing provisions of the Civil or Military Criminal Codes. In order to amend this deficiency the Ministry consider it necessary to lay down a special provision which covers every kind of German exploitation in Norway performed by force or threat thereof. . . . Acts like the excessive issue of currency notes, unreasonable fixing of prices, irresponsible exploitation of clearing agreements, etc., can hardly be assimilated with any particular crime already defined and covered by the law. If criminal prosecution against those individually responsible in this connection should arise, it is deemed necessary that the law should give certain instructions to those administering the law. Those regulations, however, should be given a very comprehensive though general form, considering the very varied economic transactions which may arise in this connection."

Accordingly the following provision is made by Art. 2 of the Law on the Punishment of Foreign War Criminals:

" Confiscation of property, requisitioning, imposition of contributions, illegal imposition of fines, and any other form of economic gain illegally

acquired by force or threat of force, are deemed to be crimes against the Civil Criminal Code, Art. 267 and Art. 268, paragraph 3."[1]

IV. PROVISIONS REGARDING ATTEMPTS AND COMPLICITY

Art. 4 of the Law states that:

" The attempted commission of any crime referred to in Art. 1 of the present law is subject to the same punishment as an accomplished act. Complicity is also punishable."

V. NECESSITY AND SUPERIOR ORDERS

Art. 5 makes the following provision:

" Necessity and superior orders cannot be pleaded in exculpation of any crime referred to in Art. 1 of the present law. The court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted."

VI. COURTS TRYING ALLEGED WAR CRIMINALS

In Norway, no special Courts, military or otherwise, have been set up to try cases of alleged war crimes. Such proceedings are brought before the ordinary Courts of the land.

The following are the Courts which are in various ways involved in trials of alleged war criminals:

(1) The Herreds—and Byrettene (County and Town Courts) which are composed of a judge by profession, appointed by the King, and two lay judges chosen by ballot for the individual trial. The judge by profession acts as President of the Court (Art. 29 of Law No. 2, of 21st February, 1947).

(2) The Five Lagmannsrette (Courts of Appeal) which are each composed of three judges by profession appointed by the King, and four lay judges chosen by ballot for each individual trial. The senior judge acts as President of the Court (Art. 30 of Law No. 2 of 21st February, 1947).

(3) Høyesteretts Kjaeremaalsutvalg (Judicial Committee of the Supreme Court) which is a judicial body composed of three judges of the Supreme Court, appointed by rota for a certain period by the

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[1] Article 267 provides that:

" Robbery with violence is an act by which a person with the intention of thereby securing for himself or another person an unlawful gain by means of force against another person or by depriving him of the possibility of putting up resistance, or by means of threat in order to cause fear of life or health, takes possession of an object fully or partly belonging to another person or forces someone to commit an act whereby loss of property is incurred to the victim or to the person on whose behalf the victim is acting. He who is found guilty of robbery with violence or is an accomplice to such an act, will be punished by imprisonment up to 10 years. The punishment must not be under three years of imprisonment if loss of life or considerable injury to body or health has been caused."

Article 268 provides that:

" Robbery with violence is punished by imprisonment not under three years if:

(*c*) the crime has been committed by several persons who have conspired to commit larceny, blackmail, robbery with violence or similar crimes or if some of them have been armed. . . ."

President of the Supreme Court (Art. 8 of Law No. 5 of 13th August, 1915, as amended by Law No. 9, of 9th June, 1939).

(4) *The Høyesterett* (*Supreme Court*). There are at present 18 Supreme Court Judges (by profession) including the President, all appointed by the King. For the time being two parallel sections of the Supreme Court are operating. As a rule each section is composed of five judges, the senior judge of each section acting as Chairman (*cf.* Art. 5 of Law No. 5 of 13th August, 1915, as amended by Law No. 9 of 9th June, 1939). Nevertheless, in cases where a death sentence has been passed by the lower court, or where death sentence is demanded before the Supreme Court, both sections of the Supreme Court must take part in the judgment. The same applies regardless of these conditions, if a majority of the judges of that particular section are of the opinion that death sentence should be applied.

One of the 10 judges (the junior by appointment) shall then abstain from voting. A death sentence must be carried by a majority of at least 6 of the 9 judges (*cf.* Law No. 8 of 19th June, 1947).(1)

In cases where three or more judges are of the opinion that the case in hand must be judged in a way which is not in accordance with the interpretation of the law previously laid down by the Supreme Court, or if three or more judges consider that a provision laid down by a law, by decision of the Storting or by a Provisional Decree, is at variance with the Constitution (as in the *Klinge* case), then all the judges of the Supreme Court (at present 18) must take part in the deciding of that particular question. The same applies, if so decided by the Supreme Court, in other cases where legal questions of a particular doubtful character have been raised. (*cf.* Arts. 1-3 of Law No. 2 of 25th June, 1926, as amended by Law No. 8 of 9th June, 1939, and Law No. 8 of 19th June, 1947).

As a rule, cases concerning any offence against the criminal law which can be punished by more than five years' imprisonment are dealt with by the Lagmannsrett acting as a court of first instance and assisted by a jury, in accordance with Art. 19 of Law No. 5 of 1st July, 1887, on criminal procedure. All other cases are, according to Art. 22 of the said law, in the first instance tried by the Herreds—or Byrett (County or Town Court). If the right to increase punishment in the case of war crimes, which is given in Art. 3 of the Law of 13th December, 1946,(2) were viewed in the light of that rule, the judicial competence of the Herredsrettene (County Courts) and the Byrettene (Town Courts) would have been considerably restricted. Hence the inclusion of Art. 6 of the Law:

> " In deciding whether cases concerning crimes referred to in Art. 1 of the present law are to be dealt with by a Court of Appeal or by a County Court or a Town Court, the power to increase punishment which is provided in Art. 3 of the present law should not be taken into consideration."

According to Art. 32 of Law No. 2 of 21st February, 1947, all cases concerning war crimes can now be brought before the Lagmannsrett in the first instance if such procedure is considered expedient by the Prosecution.

(1) Before this amendment, the Court was, in such cases, also composed of *five* judges and the death sentence had to be carried by a numerical majority only.

(2) *See* p. 89.

VII. TRIAL PROCEDURE

The procedure followed in trials of war criminals is governed by the terms of Law No. 2 of 21st February, 1947, which has now superseded various Provisional Decrees promulgated after the liberation of Norway. This law, which is also intended to apply to trials of traitors, contains rules of procedure which, according to Art. 1 (*d*) of the said law, are applicable to trials of foreign war criminals. This law aims, *inter alia*, at expediting and simplifying proceedings by transferring the relevant cases to special judges and special sections of the courts. These courts operate without a jury.

Subject to the special regulations laid down by the said law, the General Law No. 5 of 1st July, 1887, on Criminal procedure (hereinafter referred to as Law Cr. Pr.), and Law No. 5 of 13th August, 1915 (laying down general rules common to all court proceedings) are also applicable to war crimes trials.

It is to be noted that, with the exception of a provision relating to previous statements by witnesses (*see* p. 88) the " special regulations " contained in this law refer to matters other than rules of evidence. The position is therefore different from that prevailing in war crime trials held, for instance, before British and United States Courts, where the usual technical rules of evidence are to some degree waived in accordance with the special provisions applying to these courts.(1)

A typical trial before Norwegian Courts would be made up of the following parts which would take place in the order indicated :

(1) The reading of the Indictment by the President of the Court.

(2) The question to the accused : " Guilty or not guilty."

(3) First speech by the Prosecution, outlining the case.

(4) First speech by the Defence and/or statement by the accused if desired by him.

(5) Evidence by witnesses called by the Prosecution including evidence given under cross-examination.

(6) Evidence by witnesses called by the Defence including evidence given under cross-examination.

(7) The second address by the Prosecution.

(8) The second address by the Defence.

(9) Third address by the Prosecution if desired by Counsel.

(10) Third address by the Defence if desired by Counsel.

(11) Adjournment of the Court to discuss and decide the case in camera.

(12) The pronouncement of the sentence in open court.

VIII. REPRESENTATION BY COUNSEL

The accused is at any stage of the trial or of the preparation thereof entitled to choose or engage his Counsel. (*cf.* Art. 99 of the Law Cr. Pr.).

For the main hearing of the case, the Court will officially appoint a Counsel at the State's expense. As a rule the Counsel chosen or already engaged

(2) *See War Crime Trial Law Reports*, Volume I, pp. 108 and 117-118.

by the accused himself will be appointed by the Court. The same applies to preparatory meetings of the Court, such as those held for the interrogation of witnesses for the recording of evidence which is intended to be used before the Court at the main hearing of the case (*cf.* Law Cr. Pr. Arts. 99-101, and 107).

In the event of a conflict between the interests of several accused charged in the same case, a corresponding number of Counsels for the Defence are appointed (*cf.* Law Cr. Pr. Art. 110).

IX. RULES OF EVIDENCE

The accused is of course considered innocent until proved guilty. The burden of proof lies entirely with the prosecution. Furthermore, it is the duty of the Court to ensure that the case in hand is fully examined (*cf.* Law Cr. Pr. Art. 331).

The accused is under no legal obligation to give evidence himself and if he does so he is not on oath. If the statements made by the accused during the main hearing of the case are in conflict with his earlier statements recorded before the Court, the previous statements can be read before the Court. The same applies if he refuses to give any statement or explanation at all during the main hearing (*cf.* Art. 329, Law Cr. Pr.). If the accused makes a complete and unreserved confession, it is for the Court to decide whether and if so to that extent further evidence should be furnished (*cf.* 331, Law Cr. Pr.). The accused is entitled to put questions to every witness subsequent to their interrogation and to make his comments on their statements. The same applies when statements have been read before the Court or any other form of evidence has been brought forward (*cf.* Art. 338 Law Cr. Pr.).

Witnesses must, whenever possible, appear in person before the Court during the main hearing of the case. The reading of statements given earlier by a witness present during the main hearing is not as a general rule allowed.

However, during the main hearing of war crimes cases, previous statements, whether given before a court or not, may be read and used as evidence if the statement has been given by a person who has since died or disappeared or whose personal appearance is impossible to arrange or would cause considerable delay or expense. Furthermore, the court can rule out irrelevant evidence (*cf.* Art. 36 of Law No. 2 of 21st February, 1947).

Witnesses are usually under oath unless their evidence is considered unimportant or if the Prosecution and Defence do not insist on it being on oath. The oath is taken after the evidence has been given (*cf.* Art. 185 of Law Cr. Pr.).

X. PUNISHMENT

While finding that existing provisions of Norwegian law in the main adequately *defined* the acts which would in fact amount of war crimes(1) the Ministry advised the Storting that, on a number of specific points, Norwegian legal provisions did not lay down sufficiently severe *penalties* for those offences. Further, Art. 62 of the Civil Criminal Code,(2) " was

(1) *See* p. 84.
(2) *See* p. 13.

founded on the supposition of a normal social life, where the police and criminal courts are available instantly or very soon afterwards whenever a more serious crime has been committed. This was not the case during the occupation. German perpetrators of violence continued for several years their criminal activity unrestrained. As a result a considerable number of them, making use of their high position, increased their guilt by systematically committing whole series of the most appalling crimes."

The Ministry's memorandum then continues as follows: " It could be specifically laid down that Art. 62 of the Civil Criminal Code should not apply in trials of foreign war criminals. The Ministry, however, hold in the circumstances that an overall increase of the terms of punishment is a better solution when applied to the most serious war crimes and in cases of repeated offences."

Hence, Art. 3 of the Law on the Punishment of Foreign War Criminals provides that:

" In the case of crimes referred to in Art. 1 above, the sentence of imprisonment may be doubled, and penal servitude may in all such cases be substituted for imprisonment.

' A life sentence or capital punishment may be inflicted in all cases where:

" (*a*) the act caused grave bodily injury, grave suffering, prolonged deprivation of freedom, or extensive damage to property;

" (*b*) the act resulted in death, even though this outcome was not intended;

" (*c*) chapters 21, 22 and 25 of the Civil Criminal Code were repeatedly violated; or

" (*d*) particularly aggravating circumstances were present.

" Fines may be imposed in addition to capital punishment or imprisonment. As regards the collection of fines from a convicted defendant or his heirs, the provision of the Decrees concerning the punishment and financial liability of traitors are applicable."

Chapters 21, 22 and 25 of the Civil Criminal Code deal respectively with crimes against personal integrity; murder, manslaughter, assault and injury to health; and extortion and robbery.

The last paragraph, relating to fines, which is contained in the law did not appear in the Decree of 4th May, 1945. This represents the only difference between the two texts.

The death sentence can only be passed by the Lagmannsrett and the Supreme Court. In the Lagmannsrett, a verdict of " guilty " must be carried by a majority of at least five out of the seven judges. The same applies when a death sentence is passed.

In the Supreme Court a death sentence must be carried by a majority of at least six out of the nine judges.

Execution of the death sentence is carried out by shooting.

XI. APPEALS TO THE SUPREME COURT

Appeal to the Supreme Court is subject to leave having been obtained from the Judicial Committee of the Supreme Court except when :

(*a*) the sentence is appealed against by the *accused* and he has been sentenced to imprisonment for a term exceeding one year by the County or Town Court or for more than six years or to death by the Lagmannsrett ;

(*b*) the sentence is appealed against *by the prosecution* and the prosecution has demanded a more severe punishment than one or six years (as in (*a*)) (*cf.* Art. 43 of Law No. 2 of 21st February, 1947).

The prosecution has an absolute and unlimited right to appeal to the benefit of the accused (*cf.* Art. 382 of Law Cr. Pr.).

A sentence passed by the County or Town Court cannot be appealed against on points which according to the law (*see below*) may lead to a renewed trial by the Lagmannsrett.

An appeal to the Supreme Court cannot be based on any point regarding the lower court's alleged errors in the finding of facts and evidence relating to the question of guilt. The appeal can only be based on the following grounds :

(*a*) that the provisions laid down by procedural law have not been rightly applied ;

(*b*) that the provisions laid down by criminal substantive law have not been rightly applied ;

(*c*) that evidence not related to the question of guilt has been wrongly considered ;

(*d*) that the accused has been given too severe or too lenient a punishment (*cf.* Arts. 380, 384 of the Law of Cr. Pr. and Art. 44 of Law No. 2 of 21st February, 1947).

The appeal and/or the application for leave to appeal must be submitted within 14 days from the date on which the sentence was made known to the accused. The Court, however, can decide to accept the appeal even though the time limit has been exceeded if the delay was due to circumstances not depending on the appellant (*cf.* Arts. 382-385 of the Law Cr. Pr. and Art. 39 of Law No. 2 of 21st February, 1947).

The appeal is in the first instance dealt with by the Judicial Committee of the Supreme Court. If the Committee, when considering the sentence is unanimously agreed that the law has been interpreted wrongly and that the accused person must undoubtedly be acquitted, or that the sentence should be quashed or altered in favour of the accused, the Committee can pass a decision or give a new sentence accordingly. On the other hand, the Committee can, subject to the same conditions, quash the sentence and order a new trial by the lower court when it is of the opinion that the sentence would be altered by the Supreme Court in favour of the accused. In all other cases the Committee will decide whether the appeal should be rejected as unfounded or whether it should be brought before the Supreme Court (*cf.* Art. 387 of the Law Cr. Pr.), but if the accused appeals against a death sentence, the Committee must refer the case to the Supreme Court.[1]

[1] Art. 2 of Law No. 8 of 19th June, 1947.

Even if the appeal has been restricted to the punishment, the Supreme Court is entitled to decide whether the provisions of criminal substantive law have been rightly applied.

Regardless of the subject matter of the appeal the Supreme Court may consider that provisions of criminal law have been wrongly applied by the lower court to the detriment of the accused or that he has been given too severe a punishment and can declare the sentence of the lower court null and void if there is any doubt that essential provisions laid down by the law of procedure to safeguard the accused have been neglected, which in turn might have influenced the sentence to the detriment of the accused (*cf.* Law of Cr. Pr. Art. 392).

If the Supreme Court is in agreement with the sentence appealed against, the appeal is formally rejected. In other cases the Supreme Court can quash the sentence and demand a renewed trial by the lower court or pass a new sentence (*cf.* Art. 396 of the Law Cr. Pr.). If the Supreme Court quashes the sentence of the lower court and refers the case back for a new trial, the lower court is bound by the interpretation of the law outlined by the Supreme Court (*cf.* Art. 397 of the Law Cr. Pr.).

XII. RENEWED TRIAL BY THE LAGMANNSRETT

In the case of a trial by the County or Town Court, either of the parties can, subject to leave from the Judicial Committee of the Supreme Court, demand a renewed trial by the Lagmannsrett. Such leave can only be granted when the Committee consider it probable that the question of guilt has been wrongly adjudged by the lower court or when found justified by other important reasons (*cf.* Art. 40 of Law No. 2 of 19th February, 1947). The application for a renewed trial can be based on any question of fact as well as questions of mixed fact and law (*cf.* Art. 401 of the Law Cr. Pr.). The application must be submitted within 14 days after the sentence of the lower court was made known to the accused (*cf.* Arts. 382 and 383 of the Law Cr. Pr.). The renewed trial by the Lagmannsrett is governed by the same rules of procedure which apply when the Lagmannsrett is acting as a court of first instance.

XIII. RESUMPTION OF TRIALS

As a rule a sentence may be regarded as final when no appeal is allowed or the time limit for lodging an appeal has expired, but either of the parties may apply for a resumption of the trial under the following conditions:

(1) *To the benefit of the accused*:

(*a*) If it is found that forged documents have been used or false statements have been made during the previous trial or if any of the judges are criminally liable in connection with the performance of their duties and it is considered that this fact might have influenced the previous sentence, or

(*b*) If new facts or evidence are offered which either by their own weight or in connection with the evidence previously at hand are considered to be likely to lead to the acquittal of the convicted person or to the application of a milder provision of criminal law and/or to a more lenient term of punishment (*cf.* Arts. 413, 414 of Law Cr. Pr.).

(2) *To the detriment of the accused :*

(*a*) If because of a subsequent confession by the accused or in the light of new evidence offered, it is considered to be beyond doubt that the accused did actually commit the act in question or a considerably more serious one than that for which he had been convicted during the previous trial ; or

(*b*) If any of the factual conditions mentioned above under 1(*b*) are found to be present and if there are reasonable grounds to believe that this may have caused or influenced his previous acquittal or the application of substantially too mild a provision of criminal law (*cf.* Art. 415 of Law Cr. Pr., with which should be read Art. 30, paragraph 4, of Law No. 2 of 21st February, 1947.)

If the leave is granted the same Court as previously dealt with the matter will institute a new hearing of the case (*cf.* Art. 418 Law Cr. Pr.). The new sentence cannot differ from the previous sentence to the detriment of the accused on grounds unrelated to those on which there has been a resumption of the case. If the resumption has been granted to the benefit of the accused, the Court can in no circumstances pronounce a new sentence which is less favourable to the accused than the previous sentence (*cf.* Art. 421 of Law Cr. Pr.).

There is no time limit for the submission of an application for a resumption of the case.

XIV. REPRIEVE AND PARDON

The execution of a sentence may in certain circumstances be postponed.

If, for instance, the court has recommended the convicted person for pardon, the sentence cannot be executed if the convicted person would thereby suffer any form or term of punishment with which the pardon is intended to dispense. If, however, the convicted person has himself applied for pardon, the execution of the sentence can be entered upon without his consent before a decision has been taken unless otherwise decided by the authorities concerned (*cf.* Art. 473 of Law Cr. Pr. and Art. 51 of Law No. 2 of 21st February, 1947). In no circumstances must a death sentence be executed before the question of pardon has been decided upon.

The prerogative of mercy vests with the King in Council. Art. 20, paragraph 1, of the Constitution reads as follows : " The King in Council shall have the right of pardoning criminals after sentence has been passed. The criminal shall have the choice of whether he will accept the King's grace or submit to the punishment meted out to him."

The pardon may be complete or partial in the sense that a death sentence may be commuted into imprisonment or a term of imprisonment diminished.

ANNEX II

FRENCH LAW CONCERNING TRIALS OF WAR CRIMINALS BY MILITARY TRIBUNALS AND BY MILITARY GOVERNMENT COURTS IN THE FRENCH ZONE OF GERMANY

I. THE TWO TYPES OF TRIBUNAL

War Crime Trials conducted according to French Law have been heard either by Permanent Military Tribunals or by Military Government Tribunals in the French Zone of Germany.

Since the great majority of trials have been held before Permanent Military Tribunals this annex deals mainly with these Courts. Two sections, however, relate to Military Government Tribunals.(1)

II. THE JURISDICTION AND LEGAL BASIS OF FRENCH PERMANENT MILITARY TRIBUNALS FOR THE TRIAL OF WAR CRIMINALS

The competence of French Military Tribunals to try war criminals, apart from those sitting in the French Zone of Germany, is based on the Ordinance of 28th August, 1944, concerning the suppression of war crimes, which, by virtue of Art. 6 thereof, is applicable not only to Metropolitan France but also to Algeria and the Colonies.

The first paragraph of Art. 1 of the Ordinance runs as follows:

> " Enemy nationals or agents of other than French nationality who are serving the enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17th June, 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies, shall be prosecuted by French military tribunals and shall be tried in accordance with the French laws in force, and according to the provisions set out in the present Ordinance, where such offences even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."

The Military Tribunals which have heard cases tried under the Ordinance have been Permanent Military Tribunals sitting at Strasbourg, Lyons and a number of other centres.

Art. 124 of the *Code de Justice Militaire* states that: " In time of war, there shall be at least one Permanent Military Tribunal in each military region ; the seat of this Military Tribunal shall, in principle, be the chief town of the military region. . . ."

(1) *See* pp. 100-102.

III. THE COMPOSITION OF A FRENCH WAR CRIMES TRIBUNAL

Art. 5 of the Ordinance runs as follows: " For adjudicating on war crimes, the military tribunal shall be constituted in the manner laid down in the *Code de Justice Militaire*. The majority of the military judges shall be selected from among officers, non-commissioned officers and other ranks belonging, or having belonged, to the French Forces of the Interior or a Resistance Group."

Since the Wagner Trial was held in April and May, 1946, while the legal date of the termination of war-time was 1st June, 1946, the provisions concerning military tribunals in time of war were applicable. An Act of 5th October, 1944, provides that until the legal date of the termination of wartime, Permanent Military Tribunals shall be composed of five military judges, in accordance with the provisions of Art. 156 of the Military Code. Permanent Military Tribunals in time of peace, under Art. 10 of the Military Code, are composed of a civilian judge as President, and 6 military judges.

IV. PERSONS SUBJECT TO THE JURISDICTION OF FRENCH MILITARY TRIBUNALS FOR THE TRIAL OF WAR CRIMES

Art. 1 of the Ordinance states that the persons liable to prosecution thereunder are: " Enemy nationals or agents of other than French nationality who are serving the enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities; either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17th June, 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies."

Art. 4 lays down that " Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates."

In the trial of Wagner and Six Others, both the *Acte d'Accusation* and the judgment of the Tribunal refer to Arts. 59 and 60 of the *Code Pénal* as being relevant to the charge and to the sentence respectively.

Art. 59 of the Code states that " The accomplices to a crime or a delict shall be visited with the same punishment as the authors thereof, excepting where the law makes other provisions."

Art. 60 of the *Code Pénal* defines as an accomplice to a crime or a delict: " Any person who, by gifts, promises, threats, abuse of power or authority, or guilty machinations or devices (*artifices*), has instigated a crime or delict or given orders for the perpetration of a crime or delict; any person who has supplied the arms, tools or any other means that have been used in the commission of the crime or offence, knowing that they would be so used; or who has wittingly aided or assisted the author or authors of the crime or offence in any acts preparatory to, or facilitating its perpetration, or in its execution. . . ."

All the accused in the Wagner trial except Grüner, who was charged with premeditated murder, were charged with complicity in that crime. Consequently a large proportion of the questions put by the President to the Judges in the Wagner trial enquired whether the accused had been accomplices in the commission of the various acts alleged. The Judges were asked whether Wagner had been an accomplice, " in abuse of authority or power," in the passing of the illegal sentences alleged in the case, and in the shooting of the prisoners of war. The Judges were also asked whether Röhn, in like manner, had been an accomplice in the latter crime.

V. CRIMES MADE PUNISHABLE BY THE ORDINANCE

The terms " War Crime " and " War Criminal " are left undefined in the Ordinance, but it seems to follow from the wording of Art. 1 that the offences to be punished are such infractions of French Law as are not made justifiable by the laws and customs of war.

It will be noted that the scope of the term " War Crime " as thus defined, is not quite the same as that laid down in the British Royal Warrant, where it signifies any violation of the laws and usages of war, committed during any war in which His Majesty has been or may be engaged since 2nd September, 1939.(1)

Attention should be drawn to the offences specifically mentioned in the second paragraph of Art. 1 and in the whole of Art. 2. These passages are as follows :

> " In particular,(2) the offences specified and made punishable under Arts. 92, 132, 265 *et seq.*, 295, 296, 301, 302, 303, 304, 309 to 317, 332, 334, 341, 342, 343, 344, 379, 400, and 434 to 459 of the *Code Pénal* and Arts. 214, 216, 221 *et seq.*, of the *Code de Justice Militaire* shall be the subject of prosecution in accordance with the above provisions, if they have been committed in the circumstances described in paragraph 1 of the present Article.
>
> " *Article* 2. The provisions of the *Code Pénal* and of the *Code de Justice Militaire* shall be interpreted as follows :
>
> "(1) The illegal recruitment of armed forces, as specified in Art. 92 of the *Code Pénal*, shall include all recruitment by the enemy or his agents ;
>
> "(2) Criminal association, as specified in Arts. 265 *et seq.*, of the *Code Pénal*, shall include within its scope organisations or agencies engaged in systematic terrorism ;
>
> "(3) Poisoning, as specified in Art. 301 of the *Code Pénal*, shall include the exposure of persons in gas chambers, the poisoning of water or foodstuffs, and the depositing, sprinkling or applying of noxious substances intended to cause death ;
>
> "(4) Premeditated murder, as specified in Art. 296 of the *Code Pénal*, shall include killing as a form of reprisal ;

(1) Regarding the French approach to war crime trials and their punishment, *see also* pp. 53-4.

(2) The Court of Appeal has pointed out that this enumeration is not intended to be exhaustive (*see* pp. 46-7).

"(5) Illegal restraint, as specified in Arts. 341, 342 and 343 of the *Code Pénal*, shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced.

"(6) Illegal restraint, as specified in paragraphs 1 and 2 of Art. 344 of the *Code Pénal*, shall include the employment on war work of prisoners of war or conscripted civilians ;

"(7) Illegal restraint, as specified in the last paragraph of Art. 344 of the *Code Pénal*, shall include the employment of prisoners of war or civilians in order to protect the enemy ;

"(8) Pillage, as specified in Arts. 221 *et seq.*, of the *Code de Justice Militaire*, shall include the imposition of collective fines, excessive or illegal requisitioning, confiscation or spoliation, the removal or export from French territory by whatever means of property of any kind, including movable property and money."

One of the Articles which are mentioned in the second paragraph of Art. 1, and whose contents are not indicated in Art. 2, has been dealt with in the notes to the Wagner case ; it has been seen that Art. 295 of the *Code Pénal* defines murder. As this Annex states elsewhere, Art. 302 provides the penalty for premeditated murder, patricide and poisoning, and Art. 304 provides the penalty for murder.(1)

Of the remainder, Art. 132 of the *Code Pénal* deals with the counterfeiting and altering of French money and the circulation thereof, Arts. 265 *et seq.*, with conspiracies to prepare or commit crimes against persons or property, 303 with torture and acts of barbarity, 309-317 with voluntary wounding and striking, not regarded as murder, and other voluntary crimes and delicts, 332 and 334 with certain sexual offences, 379 with theft, 400 with extortion, and 434-459 with arson and other forms of destruction. Art. 214 of the *Code de Justice Militaire* deals with abuse of authority and 216 with offences against wounded, sick and dead soldiers.

VI. PROVISIONS REGARDING THE DEFENCE OF SUPERIOR ORDERS

Art. 3 of the Ordinance runs as follows : " Laws, decrees or regulations issued by the enemy authorities, orders or permits issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Art. 327 of the *Code Pénal*, but can only, in suitable cases, be pleaded as an extenuating or exculpating circumstance."

Art. 327 of the *Code Pénal* makes the following provision : " No crime or delict is committed when the homicide, wounding or striking was ordered by the law or by legal authority."

Further details relating to the defence are set out on pp. 54-5.

VII. PENALTIES ATTACHING TO WAR CRIMES

Art. 1 of the Ordinance states simply that the persons specified therein shall be " prosecuted by French Military Tribunals and shall be judged in accordance with the French laws in force."

(1) *See* p. 97.

Apart from making certain special provisions concerning military degradation and loss of rank and prohibition of residence, and apart from providing the penalties attaching to the commission of a *delict*, Art. 192 of the *Code de Justice Militaire*, the only article appearing under the Chapter heading: " Penalties Applicable," states : " The penalties which can be applied within the military jurisdictions for *crimes* are those laid down in Arts. 7 and 8, of the *Code Pénal.*" (Italics inserted.)

These Articles, together with the preceding one, read as follows :

"(6) The penalties for crimes are either corporal and ignominious, or simply ignominious.

"(7) The penalties which are corporal and ignominious are : (1) death ; (2) penal servitude for life ; (3) deportation ; (4) penal servitude for a term ; (5) detention ; (6) confinement.

"(8) The ignominious penalties are : (1) banishment ; (2) civic degradation."

These articles provide the possible range of punishment under French Criminal Law ; Articles providing against individual offences supply the relevant penalties. For instance, in the Wagner trial, Articles 302 and 304 of the *Code Pénal* were referred to by the Prosecution, and by the Tribunal in its judgment. The former provides that the penalty for premeditated murder, patricide and poisoning shall be death. The latter lays down that simple murder (i.e., voluntary homicide) shall be punished by penal servitude for life, except in two cases, when the death penalty shall be pronounced. The first arises when the murder has been preceded, accompanied or followed by another crime.(1) The second arises when the murder has had as its object the preparation, facilitation or execution of a delict, or the facilitating of the flight, or assuring the impunity, of the authors or accomplices of a delict.(2)

VIII. THE PROCEDURE FOLLOWED IN FRENCH WAR CRIMES TRIALS

The Ordinance makes no special provisions regarding procedure, but simply makes reference to trial " in accordance with the French laws in force." It is useful, however, to make a short survey of the procedure applied in French war crime trials, with particular reference to the Wagner case.

After his preliminary investigation of the case (*Information*), a military *Juge d'Instruction* decides whether it should go before a Military Tribunal for trial.

Article 68 of the *Code de Justice Militaire*, to which reference was made by the Tribunal in rejecting the plea made by Grüner's Counsel to the Jurisdiction of the Tribunal, includes the following passage :

" For all acts liable to be punished by sentences of death, deportation, penal servitude, imprisonment or confinement, the case can be sent before

(1) *See* the account on p. 41 of the questions put to the Military Judges regarding Grüner.

(2) And *see also* the penalties provided by the Articles quoted in the notes to the Wagner Trial, pp. 50-3. Articles 35 and 37 of the *Code Pénal*, to which also the *Acte d'Accusation*, and the Tribunal referred, make general provisions regarding the cases where civic degradation may, or must, be accompanied by imprisonment, and regarding wartime confiscation or the benefit of the nation of the goods of a condemned person.

a Military Tribunal only by the Court of Indictment (*Chambre des mises en accusation*) of the Appeal Court for the jurisdictional area within which the Tribunal operates."

In peace time, accordingly, the *Juge d'Instruction* must refer such cases to the Court of Indictment of the appropriate appeal court, in accordance with Art. 66 of the Code, which provides to that effect.

As the Tribunal trying the Wagner case pointed out, however, Art. 68 of the *Code de Justice Militaire* is not applicable " in time of war."

Article 125 *bis* of that code provides that: " All the rules laid down in Title I of this Code, concerning Permanent Military Tribunals in time of peace, must be observed also as regards Permanent Military Tribunals in the territorial districts in time of war, the powers of the General commanding the territorial district in time of peace being transferred to the General commanding the military region or the territorial district to the extent of the territory under his authority, provided that: . . .

" (2) In time of war, Art. 68 shall be inapplicable, and the sending of cases before a Military Tribunal by Order of Committal shall be carried out by a military *Juge d'Instruction*, as regards both Permanent Military Tribunals and Military Tribunals attached to the armies."

Again, Art. 177, to which the Tribunal specifically referred, provides that: " If the *Juge d'Instruction* . . . is of the opinion that the act charged constitutes an offence within the military jurisdiction he shall refer the accused for trial to a Military Tribunal, Art. 68 not being applicable. . . ."

The next steps are provided by Art. 69, 177 and 179 of the *Code de Justice Militaire*. The appropriate Public Prosecutor (*Commissaire du Gouvernement*) is charged with taking action against the acused before the Military Tribunal to which he is attached. He must immediately cause the accused to be notified of the Order of Trial (*Ordonnance de Renvoi*) whereby the *Juge d'Instruction* has sent the case before the Military Tribunal. He sends, to the General commanding the territorial district in which the Military Tribunal sits, a request for its convocation. Finally, he must also draw up an *Acte d'Accusation* (Indictment). This document is, in fact, a recital of the facts alleged by the Prosecution.

Art. 179 of the Code states that, 24 hours at least before the meeting of the Tribunal, the Public Prosecutor shall communicate to the accused a notification containing the order convening the Tribunal, the crime alleged, the text of the law applicable and the names of the witnesses whom he proposed to call. If the accused has not chosen a defending Counsel, a Counsel will be officially provided for him.

Art. 72 of the Code provides that trials shall be public, except where the Tribunal decides that this appears dangerous to public order or morals. In any case the judgment must be delivered in public.

Art. 119 of the Code, which was mentioned in the Wagner proceedings in connection with the absence of Huber, contains the following passages: " When the accused has been referred to a Military Tribunal for trial and it has not been possible to arrest him, or when he has escaped after being arrested . . . on the receipt of the Decision (1) or Order of Trial, and on

(1) A reference to the decision of a higher court referring a matter to a Military Tribunal for trial. *See* earlier in these notes on procedure, pp. 97-8.

the initiative of the Public Prosecutor, the President of the Military Tribunal shall issue an Order, setting out the crime or delict for which proceedings are being taken against the accused, and stating that he will be held bound to present himself within six days, reckoning from the date of execution of the last of the formalities connected with the publication of the said Order.

" In wartime, or where the territory in which the offence has been committed is declared to be in a state of siege, the period shall be reduced to five days."

If the accused fails to present himself during the period of grace, Art. 120, quoting a Decree-Law of 20th May, 1940, states that proceedings can be taken against him in his absence or in default (*par contumace ou par défaut*).

The discretionary power of the President regarding the use of evidence, which was referred to in the Wagner trial, arises out of Art. 82 of the Code, which includes the following words: " The President shall have a discretionary power in relation to the conduct of the proceedings and the finding of the truth. He shall be able, during the proceedings, to cause to be produced any evidence which seems to him to be of value for the finding of the truth, and to call, even by means of a summons, or to produce, any person to whom it seems necessary that a hearing should be given."

After the examination of the witnesses, the accused (1) and the evidence, and after hearing the arguments of Counsel, the accused and his Counsel having the last word, the Tribunal must then, in accordance with Arts. 89-91 of the Code, retire and vote by secret ballot, answering " yes " or " no " to the questions of fact and law put by the President. By a law of 3rd February, 1941, the simple majority is sufficient for decisions on these questions, during wartime. Otherwise the majority must be at least 5 to 2. Should the accused be found guilty, the Tribunal must then, by virtue of Art. 91 of the Code, decide whether there were extenuating circumstances, and must fix the penalty.

In accordance with Art. 93, the President of the Tribunal must then read the judgment in public sitting.

IX. PROVISIONS REGARDING APPEALS

In time of war, according to the provisions of a Decree of 3rd November, 1939, Permanent Military Appeal Tribunals are to be set up, their number, seat and jurisdiction being fixed by decree. They are to deal only with cases involving persons convicted by Military Tribunals. Art. 135 of the *Code de Justice Militaire* states that such persons shall have twenty-four hours during which they may appeal to such a court. This period begins to run at the end of the day on which the judgment of the Military Tribunal is read.

This appeal to a Permanent Military Appeal Tribunal is the only one possible in wartime against a decision of a Permanent Military Tribunal. The former, in accordance with Art. 133 of the *Code de Justice Militaire* is not concerned with reviewing the whole trial conducted by the inferior tribunal, but only with finding whether the judgment delivered thereby constituted a correct application of the law.(2)

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(1) The accused himself cannot be examined *on oath.*

(2) The Permanent Military Appeal Tribunal does not, therefore, enquire into mere questions of fact.

Art. 134 states that: " Military Appeal Tribunals can annul decisions only in the following cases:

"(1) when the Military Tribunal has not been composed in accordance with the provisions of the Code,

"(2) when the rules of competence have been violated,

"(3) when the penalty laid down by the law has not been applied to the acts declared to be proved by the Military Tribunal or when a penalty has been pronounced which goes beyond the cases stated by the law,

"(4) when there has been a violation or omission of the formalities laid down by law as a condition of validity, and

"(5) when the Military Tribunal has omitted to decide upon a request of the accused, or an application of the Public Prosecutor, which aims at making use of a power or a right accorded by the law."

According to the provisions of the Decree of 3rd November, 1939, " In all cases where a Military Appeal Tribunal has been established, persons sentenced by Military Tribunals cannot appeal to the Court of Appeal (*Cour de Cassation*) against the decisions of Military Tribunals and of Military Appeal Tribunal."

In peacetime, in accordance with Art. 100 of the *Code de Justice Militaire*, judgments delivered by Military Tribunals can only be challenged by way of an appeal to the Court of Appeal, for the reasons and under the conditions set out by Art. 407 *et seq.* of the *Code d'Instruction Criminelle.* A convicted person has three whole days, after that on which his sentence has been notified to him, in which to inform the Clerk of his desire to appeal.

Since the appeal of Wagner, Röhn, Schuppel, Gädeke and Grüner was heard on 24th July, 1946, that is to say at a date after 1st June, the legal date of the termination of hostilities, it was heard by the Criminal Division of the Court of Appeal.

X. THE LEGAL BASIS OF MILITARY GOVERNMENT TRIBUNALS IN THE FRENCH ZONE OF GERMANY

The number of war crime trials held before French Military Government Courts has been relatively small. Their jurisdiction is laid down in Ordinance No. 20 of 25th November, 1945, and Ordinance No. 36 of 25th February, 1946, of the French Commander-in-Chief. The legal basis of war crimes legislation in the Zones of Germany was provided originally by the power of a military commander to act as the legislative judicial and executive authority for territories occupied by him, and later also by the fact that, by the Declaration regarding the Defeat of Germany and the assumption of supreme authority with respect to Germany made in Berlin on the 5th June, 1945,[1] the four Allied Powers occupying Germany have assumed supreme authority with respect to Germany including all the powers possessed by the German government and any state, municipal or local government, or authority.

Acting as Supreme Allied Commander before the emergence as separate entities of the four Allied Zones of Germany, General Eisenhower promulgated Ordinance No. 1 (Crimes and Offences) and Ordinance No. 2

[1] British Command Paper (1935), Cmd. 6648.

(Military Government Courts). A French High Command in Germany was created on 15th June, 1945, and Ordinance No. 1 of 28th July, 1945, of the French Commander-in-Chief, which was thus enacted after the Berlin Declaration and after the emergence of the four Allied Zones, maintained in force the two Ordinances of the Supreme Allied Commander referred to above. This brief account of the legal history of the French Military Government Tribunals is repeated in the Preambles to Ordinances Nos. 20 and 36 of the French Commander-in-Chief.

Law No. 10 of the Allied Control Council (*Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity*), reaffirms the right of the Commander-in-Chief of each Zone to establish within his Zone tribunals for the punishment, *inter alia*, of war crimes. Art. III, 1 and 2, thereof provide that : " Each occupying authority, within its Zone of occupation :

"(*a*) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested . . . .

"(*d*) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal.

. . . . . .

"(2) The Tribunal by which persons charged with offences hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8th August, 1945."

XI. THE JURISDICTION OF MILITARY GOVERNMENT TRIBUNALS IN THE FRENCH ZONE OF GERMANY

Arts. 1 and 2 of Ordinance No. 20 provide that :

" *Art.* 1.

" Military Government Tribunals are competent to try all war crimes defined by international agreements in force between the occupying Powers whenever the authors of such war crimes, committed after the 1st September, 1939, are of enemy nationality or are agents, other than Frenchmen, in the service of the enemy, and whenever such crimes have been committed outside of France or territories which were under the authority of France at the time when the crimes were committed.

" *Art.* 2

" These crimes are punishable by all the penalties which such Tribunals are empowered to pronounce, including the death penalty."

Art. 1 of Ordinance No. 36 lays down that :

" Military Government Tribunals in the French Zone of Occupation in Germany are competent, in virtue of Law No. 10 of the Allied Control Council concerning the punishment of persons responsible for war crimes,

crimes against peace and crimes against humanity, to try the crimes set out in that law."

The provisions of Law No. 10 which are important in this connection are those contained in Art. II, of which paragraphs 1 and 2 run as follows:

"(1) Each of the following acts is recognized as a crime:

"(*a*) *Crimes against Peace.* Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

"(*b*) *War Crimes.* Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

'(*c*) *Crimes against Humanity.* Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

"(*d*) Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal.

"(2) Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (*a*) a principal, or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same, or (*c*) took a consenting part therein, or (*d*) was connected with plans or enterprises involving its commission, or (*e*) was a member of any organisation or group connected with the commission of any such crime, or (*f*) with reference to paragraph 1(*a*), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country."

ANNEX III

UNITED STATES LAW AND PRACTICE CONCERNING TRIALS OF WAR CRIMINALS BY MILITARY COMMISSIONS, MILITARY GOVERNMENT COURTS AND MILITARY TRIBUNALS[1]

I. THE DIFFERENT TYPES OF UNITED STATES MILITARY AND MILITARY GOVERNMENT TRIBUNALS

In United States Law there are three types of Military Tribunals, namely (*a*) Courts Martial, General, Special and Summary, (*b*) Military Commissions, and (*c*) Provost Courts. In addition to these Tribunals, based on internal United States law, both Common Law and Statutory Law, there exist, in territory occupied by United States Forces, (*d*) Military Government Courts and Military Tribunals established by Military Government. This Annex, which deals with the trial of war criminals by United States Courts, is not concerned with the type of Military Tribunals mentioned under (*a*) (Courts Martial). Although United States Law (Art. 12 of the Articles of War) provides that General Courts Martial " shall have power to try any person subject to Military Law . . . and any other person who by the law of war is subject to trial by military tribunals " and although under this article the United States can at any time elect to try war criminals before General Courts Martial, this has, in practice not be done.

Provost Courts (*supra* (*c*)) are Tribunals of a summary nature. As there have not been trials of war criminals before United States Provost Courts, this type can also remain outside the scope of this introduction, which will therefore be restricted to Military Commissions (Part I) and Military Government Courts and Military Tribunals established by Military Government (Part II).

PART I: UNITED STATES MILITARY COMMISSIONS

II. THE BASIC PROVISIONS

The United States Military Commissions are an old institution which existed prior to the Constitution of the United States of America. They have been described as the American Common Law War Courts.

They were not created by statute, but recognised by statute law. In very recent decisions (the so-called Saboteur case *ex parte Richard Quirin* (1942), *in re Yamashita* (1946) and *in re Homma* (1946)) the Supreme Court of the United States had occasion to consider at length the sources and nature of the authority to create Military Commissions. The Supreme Court stated that Congress and the President, like the courts, possess no power not derived from the Constitution of the United States. But one of the objects of the Constitution, as declared by its preamble, is to " provide for the common

(1) This Annex is based on Annex II to Volume I of this series, but has been amended so as to take account of developments since the publication of Volume I.

defence." As a means to that end the Constitution gives to Congress the power to " provide for the common Defence," " To raise and support Armies," " To provide and maintain a Navy," and " To make Rules for the Government and Regulations of the land and naval Forces." Congress is given authority " to declare War . . . and make Rules concerning Captures on Land and Water," and " To define and punish Piracies and Felonies committed on the high seas and Offences against the Law of Nations." In the exercise of the power conferred upon it by the constitution to " define and punish . . . offences against the Law of Nations," of which the law of war is a part, the United States Congress has by a statute, the Articles of War, recognised the " Military Commission " appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offences against the law of war. The Supreme Court pointed out that Congress by sanctioning the trial by Military Commission of enemy combatants for violations of the law of war had not attempted to codify the law of war or to mark its precise boundaries. Instead it had incorporated, by reference, as within the pre-existing jurisdiction of Military Commissions created by appropriate command, all offences which are defined as such by the law of war, and which may constitutionally be included within the jurisdiction.

The Constitution confers on the President the " executive Power " and imposes upon him the duty to " take care that the Laws be faithfully executed." It makes him the Commander in Chief of the Army and Navy. The Constitution thus invests the President as Commander in Chief with the power to wage war and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations including those which pertain to the conduct of war.

The President of the United States, as the Commander in Chief of the Armed Forces, and the Commanders in the Field have the power to appoint Military Commissions and to prescribe the rules and regulations under which they have to operate.

It should be added that Military Commissions may be appointed not only by the President or any Field Commander but also by any Commander competent to appoint a General Court Martial. The Commander in the Field has this right because of his general power as a Military Commander.

III. REGULATIONS FOR THE TRIAL OF WAR CRIMINALS BY MILITARY COMMISSIONS

The British Royal Warrant of 14th June, 1945 (*see* Annex I of Volume I of this series, pp. 105-110) has made regulations for the trial of war criminals for all British Military Courts in all theatres of operations and in all territories under the jurisdiction of the United Kingdom Government and armed forces.

The United States authorities, on the other hand, have made different provisions for different territories. The President, as President and Commander in Chief of the Army and Navy, by Order of 2nd July, 1942 (7 Federal Register 5103), appointed a Military Commission and directed it to try Richard Quirin and seven other German saboteurs for offences against the laws of war and the Articles of War and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any

judgment or sentence of the Commission. At the same time, by Proclamation (7 Federal Register 5101), the President declared that " all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defences, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the laws of war, shall be subject to the laws of war and to the jurisdiction of military tribunals." The Supreme Court of the United States in its decision *ex parte Richard Quirin*, 317 U.S. 1 (1942), sustained the validity of this procedure against various contentions based upon the Constitution of the United States.

Similarly, by command of General McNarney, Regulations for the Trial of War Crimes for the Mediterranean theatre of operations were made on the 23rd September, 1945, by circular No. 114 ; these Regulations (in the following pages called the Mediterranean Regulations), formed the basis of the proceedings against General Dostler (*see* Case 2 of Volume I of this series).

By command of General Eisenhower, a directive regarding Military Commissions in the European theatre of operations was made by an Order of 25th August, 1945 (to be called the European directive hereafter). These rules applied, e.g., to the *Hadamar* trial (Case No. 4, of Volume I of this series), and to the Trials of Schosser, Goldbrunner and Wilm, reported in the present volume.

For the United States Armed Forces, Pacific, Regulations governing the trial of war criminals were made by General MacArthur on 24th September, 1945. These regulations of 24th September, 1945, formed the basis of the trial, *inter alia*, of the Japanese General *Yamashita* and of the *Jaluit Atoll Case*, No. 6 in this series. These regulations were superseded almost immediately after the Yamashita trial by the " Regulations Governing the Trials of Accused War Criminals " of 5th December, 1945, generally called " SCAP Regulations " or " SCAP Rules." Whenever, in this Annex, " SCAP " Rules are quoted, the reference is to the Regulations made on 5th December, 1945. The earlier Regulations of 24th September, 1945, which sometimes, in the parlance of the officers of the courts, were also cited as " SCAP " Rules, will, to distinguish them from the Document dated 5th December, 1945, here be called the " Pacific September Regulations." The " SCAP Regulations " were supplemented by *Rules of Procedure and Outline of Procedure for Trial of Accused War Criminals*, issued by Headquarters, United States Eighth Army, and dated 5th February, 1946, and were amended in a letter of General MacArthur dated 27th December, 1946.

Another set of Regulations similar to the Pacific September Regulations were issued for the China Theatre on 21st January, 1946, and are referred to hereafter as the China Regulations.

IV. THE DEFINITION OF WAR CRIME IN THE REGULATIONS FOR THE TRIAL OF WAR CRIMINALS IN THE DIFFERENT UNITED STATES THEATRES OF OPERATIONS

The definition of " war crime " and consequently the scope of the offences falling under the jurisdiction of Military Commissions is different according to the different Regulations and Directives dealt with in the preceding paragraph of this Annex.

The narrowest jurisdiction is that vested in the Military Commissions appointed in the Mediterranean Theatre of Operations. In the Mediterranean Regulations (Regulation 1) the expression " war crime " means a violation of the laws or customs of war.

Under the European Directive (paragraph 1*a*), Military Commissions are appointed for the trial of persons who are charged with violations of the laws or customs of war, of the law of nations or of the laws of occupied territory, or any part thereof. The European Directive adds therefore to the jurisdiction of Military Commissions violations of the law of nations other than the laws or customs of war, and violations of the local law of the occupied territory. In Regulation 5 of the Pacific September Regulations the offences falling under the jurisdiction of the Military Commissions are described as follows : " murder, torture or ill-treatment of prisoners of war or persons on the seas ; killing or ill-treatment of hostages ; murder, torture or ill-treatment or deportation to slave labour or for any other illegal purpose, of civilians of, or in, occupied territory ; plunder of public or private property ; wanton destruction of cities, towns or villages ; devastation, destruction or damage of public or private property not justified by military necessity ; planning, preparation, initiation or waging of a war of aggression, or an invasion or war in violation of international law, treaties, agreements or assurances ; murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or in connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated ; and all other offences against the laws or customs of war ; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy."

The SCAP Regulations of 5th December, 1945, which have superseded the Regulations of 24th September, 1945, define the offences to be tried by the Military Commissions in the following words (Regulation 2(*b*)) :

"(1) Military commissions established hereunder shall have jurisdiction over all offences including, not limited to, the following :

"(*a*) The planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

"(*b*) Violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory ; murder or ill-treatment of prisoners of war or internees or persons on the seas or elsewhere ; improper treatment of hostages ; plunder of public or private property ; wanton destruction of cities, towns or villages ; or devastation not justified by military necessity.

"(*c*) Murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during the

war, or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime defined herein, whether or not in violation of the domestic laws of the country where perpetrated.

"(2) The offence need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately preceding the Mukden incident of 18th September, 1931."

In the China Regulations the jurisdiction of the Commission is circumscribed as follows: " The military commissions established hereunder shall have jurisdiction over the following offences: Violations of the laws or customs of war, including but not limited to murder, torture, or ill-treatment of prisoners of war or persons on the seas ; killing or ill-treatment of hostages, murder, torture or ill-treatment, or deportation to slave labour or for any other illegal purposes, of civilians of, or in, occupied territory ; plunder of public or private property ; wanton destruction of cities, towns or villages ; devastation, destruction or damage of public or private property not justified by military necessity ; murder, extermination, enslavement, deportation or other inhuman acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated ; and all other offences against the laws or customs of war ; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy."

In describing the offences subject to trial by Military Tribunals, the Regulations used in the Pacific theatre and in China reflect the influence of the Four Power Agreement of 8th August, 1945, and particularly of Article 6 of the Charter of the International Military Tribunal annexed to it. Under the Charter the International Military Tribunal has jurisdiction over:

(*a*) Crimes against peace,

(*b*) War crimes, namely, violation of the laws or customs of war, and

(*c*) Crimes against humanity.

Military Commissions operating under the SCAP Regulations have jurisdiction over all offences, including, but not limited to, the three types of offences enumerated. It is also expressly stated there that the offences need not have been committed after a particular date, but in general should have been committed since or in the period immediately preceding the Mukden incident of 18th September, 1931.

V. COMPOSITION OF MILITARY COMMISSIONS

Under all the Regulations mentioned Military Commissions must be composed of not fewer than three members. In the European and Mediterranean Theatres of Operations the members must be officers of the United States Army. (Paragraph 1(*c*) of the European Directive and Regulation 3 of the Mediterranean Regulations.)

Under Regulation 8 of the China Regulations, a Commission may consist of Army and other service personnel or of both service personnel and civilians. The Pacific September Regulations, on the other hand, provide also for " international military commissions consisting of representatives of several nations or of each nation concerned, appointed to try cases involving offences against two or more nations or any other offences ; and commissions consisting of members of any one branch or of several branches of the army services of one or more nations." (Regulation 2.) The SCAP Regulations contain similar provisions (Regulation 1(*b*)) with the difference that an International Commission may also try cases involving offences against one nation only.

The most outstanding instance of an American Military Tribunal consisting of representatives of several nations is the International Military Tribunal for the Far East which was established by Special Proclamation of General Douglas MacArthur of 19th January, 1946 (as amended by a subsequent Order of 26th April, 1946), " for the just and prompt trial and punishment of major war criminals in the Far East." The Pacific September Regulations (No. 5(*b*)) also provide that persons whose offences have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of local jurisdiction, which is an application of the Moscow Declaration of 30th October, 1943, to the Pacific theatre of war.

The provision relating to the return of Japanese war criminals to the scene of their crimes is omitted in the SCAP Regulations. It is, however, retained in the China Regulations (Regulation 5(*b*) concerning persons whose offences have a geographical location outside the China Theatre of Operations).

VI. THE JUDGE ADVOCATE

In American law the function of the Judge Advocate is entirely different from that of the Judge Advocate in British Military Tribunals. Whereas the British Judge Advocate is an impartial adviser to the Tribunal (*see* Annex I of Volume I, paragraph VI) Article 17 of the American Articles of War provides that the trial judge advocate of a general or special Court Martial shall prosecute in the name of the United States, and shall, under the direction of the Court, prepare the record of its proceedings. The Mediterranean Regulations (No. 3) provide that for each Military Commission there shall be appointed a judge advocate and a defence Counsel with such assistants as may be required, whose duties shall be similar to those of like officers before General Courts Martial. Similar provisions apply to the European Theatre (paragraph 1(*c*) of the Directive), and under the Pacific September Regulations (Regulation 11), the SCAP Rules (Regulation 4(*a*)) and the China Regulations (Regulation 11). In the two Regulations relating to the Pacific, it is also provided that in prosecutions for offences involving more than one nation, each nation concerned may be represented among the prosecutors. In the SCAP Regulations, this is expressly left to the discretion of the convening authority.

VII. RULES OF PROCEDURE

The Mediterranean Regulations (No. 8) provide that Military Commissions shall conduct their proceedings as may be deemed necessary for full and fair

trial, having regard for, but not being bound by, the rules of procedure prescribed for General Courts Martial. In the European directive it is stated (by paragraph 2) that Military Commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such Commissions, and with the rules of procedure set forth in the directive, as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for General Courts Martial.

In the Regulations applied in the Pacific Theatre it is provided, *inter alia*, that the Commission shall confine each trial strictly to a fair, expeditious hearing of the issues raised by the charges, exclude irrelevant issues or evidence and prevent any unnecessary delay or interference. (Regulation 13(*a*) of the September Regulations and Regulation 5(*a*) (1) of the SCAP Rules. In substance the same is provided in Regulation 13(*a*) of the China Regulations.) The Sessions of the Commission shall be public except when otherwise directed by the Commission. (Regulation 13(*c*) of the September Regulations ; Regulation (5*a*) (3) of the SCAP Rules.) The accused shall be entitled, *inter alia*, to be represented prior to, and during, trial by Counsel appointed by the convening authority or Counsel of his own choice, or to conduct his own defence. (Regulation 5(*b*) (2) of the SCAP Rules ; provisions substantially to the same effect are contained in Regulation 14(*b*) of the September Regulations and Regulation 14(*b*) of the China Regulations.) The accused shall be entitled to testify on his own behalf and have his Counsel present relevant evidence at the trial in support of his defence, and cross-examine each adverse witness who personally appears before the Commission; and to have the substance of the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them. (Regulation 5(*b*) (3) and (4) of the SCAP Rules ; similarly: Regulation 14(*c*) and 14(*d*) of the September Regulations and Regulations 14(*c*) and 14(*d*) of the China Regulations.)

The Rules of Procedure and Outline of Procedure for Trials of Accused War Criminals, which were promulgated for the Pacific Theatre on February 5th, 1946, included the following under *Section I : Rules of Procedure :*

"(3) *Rights of the Accused as Witness:*

"(*a*) The accused may take the stand as a witness or he may remain silent. If he takes the stand he may make a sworn or unsworn statement but in either case he will be subject to cross-examination on statement made ; cross-examination is nowise to be limited to matters brought out on direct examination.

"(*b*) If he remains silent, the Commission may draw such inference from his failure to testify as may seem fair and competent to a reasonable mind, after taking into consideration all the competent evidence in the case.

"(*c*) The prosecution may in argument comment to the Commission on an accused's failure to testify."

VIII. RULES OF EVIDENCE

The President's order of 2nd July, 1942, mentioned in paragraph III of this Annex, appointing a Military Commission for the trial of the alleged

saboteurs, included the provision that " Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man." The provisions laid down in overseas theatres were clearly influenced by this drafting.

The Mediterranean Regulations (Regulation 10) provide expressly that the technical rules of evidence shall not be applied but any evidence shall be admitted which, in the opinion of the president of the Commission, has any probative value to a reasonable man. Similar provisions are contained in paragraph 3 of the European Directive, in Regulation 16 of the Pacific September Regulations, in Regulation 5(*d*) of the SCAP Rules and in Regulation 16 of the China Regulations.

In the Mediterranean Regulations it is added that without limiting the scope of this rule the following in particular will apply:

"(*a*) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by or attributed to such witness.

"(*b*) Any document purporting to have been signed or issued officially by any member of any allied or enemy force or by any official or agency of any allied, neutral or enemy government shall be admissible as evidence without proof of the issue or signature thereof.

"(*c*) Any report by any person when it appears to the president of the commission that the person in making the report was acting within the scope of his duty may be admitted in evidence.

"(*d*) Any deposition or record of any military tribunal may be admitted in evidence.

"(*e*) Any diary, letter or other document may be received in evidence as to the facts therein stated.

"(*f*) If any original document cannot be produced, or, in the opinion of the president of the commission, cannot be produced without undue delay, a copy or translated copy of such document or other secondary evidence of its contents may be received in evidence. A translation of any document will be presumed to be a correct translation until the contrary is shown.

"(*g*) Photographs, printed and mimeographed matter, and true copies of papers are admissible without proof.

"(*h*) Confessions are admissible without proof of circumstances or that they were voluntarily made. The circumstances surrounding the taking of a confession may be shown by the accused and such showing may be considered in respect of the weight to be accorded it, but not in respect of its admissibility."

Similar but not identical provisions are contained in the other instruments. In the SCAP Rules, for instance, it is also provided (Regulation 5(*d*) (2)) that the Commission shall take judicial notice of facts of common knowledge, official government documents of any nation and the proceedings, records and findings of Military or other Agencies of any of the United Nations, a provision which corresponds to Art. 21 of the Charter of the International Military Tribunal, annexed to the Four-Power Agreement of 8th August, 1945.

Regulation 5(*d*) (7) of the SCAP Rules, as amended on December 27th, 1946, states that: " All purported confessions or statements of the accused shall be admissible in evidence without any showing that they were voluntarily made. If it is shown that such confession or statement was procured by means which the commission believes to have been of such character that they may have caused the accused to make a false statement, the commission may strike out or disregard any such portion thereof as was so procured."

IX. CRIMES COMMITTED BY UNITS OR GROUPS

The China Regulations contain the following provisions (16(*d*) and (*e*)):

"(*d*) If the accused is charged with an offence involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial of any other member of that unit, group or organization, relative to that concerted offence, may be received as *prima facie* evidence that the accused likewise is guilty of that offence.

"(*e*) The findings and judgment of a commission in any trial or a unit, group or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein."

Similar provisions were contained in the SCAP Regulations, but were deleted by the letter of 27th December, 1946. It will be seen that these provisions are based on a principle similar to that expressed in Arts. 9 and 10 of the Charter of the (European) International Military Tribunal.

X. THE DEFENCE OF SUPERIOR ORDERS

The Mediterranean Regulations provide in Regulation 9:

" The fact that an accused acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the commission determines that justice so requires."

The corresponding provisions of Regulation 16(*f*) of the Pacific Regulations of September, 1945, of Regulation 5(*d*) (6) of the SCAP Rules and of Regulation 16(*f*) of the China Regulations provide as follows:

" The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defence, but may be considered in mitigation of punishment if the commission determines that justice so requires."

As to the development of the law regarding this plea see the notes on the *Peleus* and *Dostler* cases, in Volume I of this series, pages 18-20 and 31-33.

The Supreme Court of the United States decided in the *Yamashita* case that under the Laws of War a commanding officer may be charged with a violation of those laws solely because of his failure to control his troops.

XI. PUNISHMENT OF WAR CRIMES

For the Commissions operating in the European theatre it is provided that they may be guided by, but are not limited to, the penalties authorized by the Manual for Courts Martial, and by the laws of the United States, and of the territory in which the offence was committed or the trial is held. The Manual for Courts Martial and the Articles of War prohibit cruel and unusual punishments of every kind and otherwise provide for different crimes different punishments, from fines and imprisonment to the death sentence. The Mediterranean Regulations (No. 13) state that appropriate sentences imposed by a Military Commission are (*a*) Death (by hanging or shooting), (*b*) Confinement for life or a lesser term, (*c*) Fine.

In Regulation 20 of the Pacific Regulations of September 1945, in Regulation 5(*b*) of the SCAP Rules and in Regulation 20 of the China Theatre it is added that the Commission may also impose such other punishment as it shall determine to be proper. The Commission may also order confiscation of any property of the convicted accused, deprive the accused of any stolen property, or order its delivery to the Commander-in-Chief for disposition as he shall find to be proper, or may order restitution with appropriate penalty in cases of default. In all Regulations it is provided that concurrence of at least two-thirds of the members of the Commission present at the time of voting shall be necessary for the conviction and for the sentence. The amendments of 27th December, 1946, to the SCAP Regulations add " forfeiture of real or personal property " to the punishments which may be meted out to a convicted accused.

XII. APPEAL AND CONFIRMATION

The sentence of a Military Commission must not be carried into execution until it has been approved by the appointing authority. Death sentences must, in addition, be also confirmed by the Theatre Commander. The approving and confirming authorities have before them, in acting, a review and recommendation by the Staff Judge Advocate. Thus, while there is no " appeal " as that term is used in judicial proceedings, every record of trial is scrutinised as to the facts and points of law, and the Commanding General has trained legal advice as to what, in right and justice, should be done.

XIII. THE UNITED STATES COURTS OF LAW IN RELATION TO MILITARY COMMISSIONS

Notwithstanding the absence of a right of appeal Military Commissions are in United States law, to a certain extent, subject to control and supervision by the American courts. A Military Commission is not, any more than a Court Martial, a " Court " whose rules and judgments are subject to review by the judicial courts. The judicial courts will, however, in a proper case enquire whether the Military Tribunal has jurisdiction of the person and of the offence, and whether the sentence imposed was within the power of the Tribunal. But if the Military Tribunal had lawful authority to hear, decide and condemn, its action is not subject to judicial review merely because it is contended that it made a wrong decision on disputed

facts. Correction of errors of decision belongs to the superior military authorities on their review of the case, not to the judicial courts. The most usual way for testing the validity of trials and sentences by a Military Commission is by writ of *Habeas Corpus*. The purpose of the writ of *Habeas Corpus* is to bring the person seeking the benefit of it before the court or judge to determine whether or not he is legally restrained of his liberty. It is a summary remedy for unlawful restraint of liberty. Where it is decided that the restraint is unlawful the court orders the release of the applicant, but if the restraint is lawful the writ is dismissed. The Supreme Court of the United States has emphasised in *ex parte Quirin* and *in re Yamashita* that on application for *Habeas Corpus* the court is not concerned with the guilt or innocence of the petitioners. The court considers only the lawful power of the Commission to try the petitioner for the offence charged.

In determining this question, the court will consider the following points :

(*a*) Was the Commission created by lawful military command ?
(*b*) Is the defendant charged with a violation of the Laws of War ?
(*c*) Is any provision of the Constitution or United States statutes or any treaty or lawful military command violated by the trial ?

A broad review necessarily results from the determination of these three questions.

The Supreme Court of the United States examined the judgments of the Military Commissions in the cases *ex parte Quirin, in re Yamashita* and *in re Homma* and sustained the jurisdiction of the Military Commission, in the Quirin case unanimously, in the two other cases by majority judgments.

XIV. THE AUTHORITY OF DECISIONS OF MILITARY COMMISSIONS

Like the British Military Courts, the United States Military Commissions are not superior courts and what has been said on the authority of British Military Courts in Annex I of Volume I applies *mutatis mutandis* to decisions of United States Military Commissions.

The decisions of the Supreme Court of the United States in the three cases mentioned and the decisions of the other courts which have been or may be seised of cases of war criminals, in connection with a writ of *Habeas Corpus* or other similar remedies, have, of course, that binding authority which attaches to their decisions under the general law of the United States.

PART II : MILITARY GOVERNMENT COURTS AND MILITARY TRIBUNALS ESTABLISHED BY MILITARY GOVERNMENT

XV. THE SETTING UP OF MILITARY GOVERNMENT COURTS AND MILITARY TRIBUNALS ESTABLISHED BY MILITARY GOVERNMENT

It has been stated in the first part of this Annex that the United States Forces, European Theatre, have used two separate sets of Tribunals for the trial of war criminals, namely, Military Commissions, which have been dealt with in Part I of this Annex, and Military Government Courts and Military Tribunals. These Tribunals are distinct and have a different historical origin. The origin and jurisdiction of Military Commissions have been treated in the first part of this paper. Military Government Courts

and Military Tribunals are generally based upon the occupant's customary and conventional duty to govern occupied territory and to maintain law and order.

Military Government Courts were established for the occupied parts of Germany by Ordinance No. 2 made by General Eisenhower, as Supreme Commander of the Allied Expeditionary Force. The Supreme Commander also issued the *Rules of Military Government Courts.*

When, after the Berlin Declaration of 5th June, 1945, General Eisenhower, in his capacity of Commander-in-Chief of the American Forces in Europe, took over the administration of the American occupation zone, he made a Proclamation stating that, *inter alia*, all orders by the Military Government, including proclamations, laws, regulations and notices given by the Supreme Commander or on his instructions, remain in force in the American occupation zone unless repealed or altered by the Commander-in-Chief himself. The Military Government Ordinance No. 2 and the Rules of Procedure in Military Government Courts are, therefore, the basis of Military Government Courts established in the American zone of occupation.

Additional provisions regulating the trial of war crimes and related cases by United States Military Government Courts were made by a directive of General Eisenhower on 16th July, 1945.

On 26th June, 1946, a directive was issued by Headquarters, United States Forces, European Theatre, which contained certain new provisions as to the trial of persons accused of being participants in mass atrocities when the principal participants in such atrocities had already been convicted. A further directive was issued by Headquarters, European Theatre, on 11th July, 1946, and this in turn was replaced by one dated 14th October, 1946, extending to General Military Government Courts the jurisdiction in this matter, which had previously rested only with Intermediate Military Government Courts.

Finally, Ordinance No. 7 of the Military Government of the United States Zone of Germany, which became effective on October 18th, 1946, provided, in the words of its Art. I, for " the establishment of Military Tribunals which shall have power to try and punish persons charged with offences recognized as crimes in Art. II of Control Council Law No. 10, including conspiracies to commit any such crimes." Art. II(*a*) of the Ordinance, as will be seen presently, referred to Law No. 10 as one of the legal sources from which the power to promulgate the Ordinance arose. It is in pursuance of this Ordinance that the Military Tribunals were set up to conduct the trials commonly referred to as the " Nuremberg Subsequent Proceedings." According to the Opening Speech of the Prosecution in one of these trials, that of Josef Alstötter and 15 others, Ordinance No. 7 was enacted " for the purpose of implementing Law No. 10 of the Allied Control Council for Germany, and to carry out the purposes therein stated." In the words of the Preamble of Law No. 10 itself, the purpose of the latter was " to give effect to the terms of the Moscow Declaration of 30th October, 1943, and the London Agreement of 8th August, 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal."

XVI. JURISDICTIONAL PROVISIONS

Under Ordinance No. 2 there are three kinds of Military Government Courts: General Military Courts, Intermediate Military Courts and Summary Military Courts (Art. I of Ordinance No. 2). The jurisdiction of these Courts is as follows:

Ratione personae: These Courts have jurisdiction over all persons in the occupied territory except allied military personnel.

Ratione materiae: The Military Government Courts shall, under Article II (2), have jurisdiction over:

(i) all offences against the laws and usages of war;

(ii) all offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces;

(iii) all offences under the laws of the occupied territory or of any part thereof.

The directives of the 26th June, 11th July, and 14th October, 1946, provide that: "As a matter of policy, such cases involving offences against the laws and usages of war or the laws of the occupied territory or any part thereof, commonly known as war crimes, committed prior to 9th May, 1945, as may from time to time be determined by the Deputy Theatre Judge Advocate for War Crimes, will be tried before specially appointed Military Government Courts, except where otherwise directed by the Theatre Commander."

Arts. I and II(*a*) in full of Ordinance No. 7 provide that:

"*Art. I.* The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offences recognized as crimes in Art. II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offences.

"*Art. II.* (*a*) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Arts. 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8th August, 1945, certain tribunals to be known as 'Military Tribunals' shall be established hereunder."

Art. II of Control Council Law No. 10, which is referred to in Art. I of Ordinance No. 7, runs as follows:

"(1) Each of the following acts is recognized as a crime:

"(*a*) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing

"(*b*) War Crimes. Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

"(*c*) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

"(*d*) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

"(2) Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (*a*) a principal, or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein, or (*d*) was connected with plans or enterprises involving its commission, or (*e*) was a member of any organization or group connected with the commission of any such crime, or (*f*) with reference to paragraph 1(*a*), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country."

Arts. 10 and 11 of the Charter of the International Military Tribunal, to which specific reference is made in Art. II of Ordinance No. 7, and implicit reference in Art. II, 1(*d*) of Law No. 10, makes the following provisions:

" Art. 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

" Art. 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Art. 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization."

XVII. THE COMPOSITION OF MILITARY GOVERNMENT COURTS

General Military Government Courts and Intermediate Military Government Courts consist of not fewer than five members and not fewer than three members respectively. Military Government Courts are appointed by Army/Military District Commanders; the Orders appointing the Courts

designate one or more Prosecutors or Defence Counsel. At least one officer with legal training is detailed as a member of such Courts.

Art. II (*b*) of Ordinance No. 7, provides that each Military Tribunal set up under the Ordinance " shall consist of three or more members to be designated by the Military Governor " ; provision is also made for the appointment to each Tribunal of an alternate member, if deemed advisable by the Military Governor. Except as provided in sub-section (*c*) of the Article, all members and alternatives must be lawyers of a standing specified in the text. Sub-section (*c*) provides that :

"(*c*) The Military Governor may in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. In such cases the tribunals shall consist of three or more members as may be provided in the agreement. In such cases the tribunals may include properly qualified lawyers designated by the other member nations."

Sub-section (*e*) states that :

"(*e*) Neither the tribunals nor the members of the tribunals or the alternates may be challenged by the prosecution or by the defendants or their counsel."

XVIII. RULES OF PROCEDURE AND EVIDENCE

A Military Government Court shall in general admit oral, written or physical evidence having bearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof.

Every accused before a Military Government Court shall be entitled, *inter alia*, to be present at his trial, to give evidence and to examine or cross-examine any witness ; but the Court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent or if the accused is believed to be a fugitive from justice.

The Directive of 14th October, 1946 (paragraph 6 (*c*)) dealt, as did those of 26th June, 1946, and 11th July, 1946, with " United Nations Observers." At the time of referring charges for trial " the Deputy Theatre Judge Advocate for War Crimes will determine those United Nations, if any, which in his judgment should be invited to send observers to the trial and will extend such invitations on behalf of the Theatre Commander."

The directive of 14th October, 1946, contains in its paragraph 12 detailed provisions under the heading " Mass Atrocity Subsequent Proceedings." It is there recalled that " certain mass atrocity cases have heretofore been tried, i.e. Hadamar,(1) Dachau and Mauthausen cases, wherein the principal participants of the respective mass atrocities were charged with violating the laws and usages of war under particulars alleging that they acted in pursuance of a common design to subject persons to killings, beatings, torture, starvation, abuses and indignities, or particulars substantially to the same effect. The courts pronounced sentences in those cases involving imprisonment and death and of necessity, in view of the issues involved therein, found that the mass atrocity operation involved in each was criminal

(1) *See* Volume I of this Series, pp. 46-54.

in nature and that those involved in the mass atrocities acting in pursuance of a common design did subject persons to killings, beatings, tortures, etc." The Directive now provides, with regard to subsequent proceedings against accused other than those involved in initial or " parent " mass atrocity cases, *inter alia*, that : " In such trial of additional participants in the mass atrocity, the prosecuting officer will furnish the court certified copies of the charge and particulars the findings and the sentences pronounced in the parent case." Thereupon the court " will take judicial notice of the decision rendered in the parent case, including the finding of the court (in the parent case) that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, did subject persons to killings, beatings, tortures, etc., and no examination of the record in such parent case need be made for this purpose. In such trials of additional participants in the mass atrocity, the court will presume, subject to being rebutted by appropriate evidence, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof."

Art. VII of Ordinance No. 7 makes the following general provisions relating to the evidence of which Military Tribunals set up thereunder may take account :

> " The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges : affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require."

The following Articles, contained in the Ordinance, are also of considerable interest :

> " *Art. IX.* The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.
>
> " *Art. X.* The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except in so far as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International

Military Tribunal in the judgment of Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."[1]

Art. IV of the Ordinance makes certain provisions designed " to ensure fair trial for the defendants." These relate for instance to the right of the accused to receive in advance of the trial a copy of the indictment and of all documents lodged therewith, translated into a language which he understands ; to be represented by Counsel of his own selection, within certain limits ; and to give and present evidence and cross-examine any witnesses called by the Prosecution. The Tribunal may proceed in the absence of an accused if he has been granted permission to be absent or if his temporary absence in the opinion of the Tribunal will not impair his interests.

XIX. POWERS OF SENTENCE

General Military Government Courts may impose any lawful sentence, including death.

Art. XVI of Ordinance No. 7 makes the following provision as regards Military Tribunals set up under the Ordinance :

" The Tribunal shall have the right to impose upon the defendant, upon conviction, such punishment as shall be determined by the tribunal to be just, which may consist of one or more of the penalties provided in Art. II, Section 3, of Control Council Law No. 10."

The provisions of Control Council Law No. 10 which are here referred to are as follows :

" Any person found guilty of any of the Crimes above-mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following :

"(*a*) Death.

"(*b*) Imprisonment for life or a term of years, with or without hard labour.

"(*c*) Fine, and imprisonment with or without hard labour, in lieu thereof.

"(*d*) Forfeiture of property.

"(*e*) Restitution of property wrongfully acquired.

"(*f*) Deprivation of some or all civil rights. . . ."

XX. REVIEW OF SENTENCES

A person convicted by a Military Government Court has the right to petition for review of the finding or sentence. The petition must be filed with the Court within 10 days of conviction.

No sentence of a Military Government Court shall be carried into execution until the case record shall have been examined by an Army/Military District Judge Advocate and the sentence approved by the officer appointing the Court or by the Officer Commanding for the time being. No sentence of death shall be carried into execution until confirmed by higher authority.

(1) This is a reference to the Trial of the Major German War Criminals, by the International Military Tribunal, Nuremberg, 20th November, 1945—1st October, 1946.

The Reviewing authority may, upon review, *inter alia* :

confirm or set aside any finding,

substitute the finding of guilty by an amended charge,

confirm, suspend, reduce, commute or modify any sentence or order, or increase any sentence, where a petition for review which is considered frivolous has been filed and the evidence in the case warrants such increase.

The reviewing authority may at any time remit or suspend any sentence or part thereof.

The proceedings shall not be invalidated nor any findings or sentences disapproved for any error or omission, technical or otherwise, occurring at any such proceedings, unless in the opinion of the reviewing authority it shall appear that the error or omission has resulted in injustice to the accused.

Art. XV of Ordinance No. 7 makes the following provisions regarding the verdicts and sentences of Military Tribunals set up under the Ordinance :

" The Judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based and shall be final and not subject to review. The sentences imposed may be subject to review as provided in Art. XVII, *infra*."

Art. XVII of the Ordinance states :

"(*a*) Except as provided in (*b*) *infra*, the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof.

"(*b*) In cases tried before tribunals authorised by Art. II (*c*),(1) the sentence shall be reviewed jointly by the Zone Commanders of the nations involved, who may mitigate, reduce or otherwise alter the sentence by majority vote, but may not increase the severity thereof. If only two nations are represented, the sentence may be altered only by the consent of both zone commanders."

Art. XVIII thereof adds the following :

" No sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor. In accordance with Art. III, Section 5, of Law No. 10, execution of the death sentence may be deferred by not to exceed one month after such confirmation if there is reason to believe that the testimony of the convicted person may be of value in the investigation and trial of other crimes."

(1) *See* p. 117.

INDEX

Abbaye Ardenne Trial, 69
Allied Control Council, Law No. 10 of, 101-2, 114, 115
Alsace, legal status of during German occupation, 36-7, 45
American Jurisprudence, 61

Belsen Trial, 69, 70, 72

Defeat of Germany and Assumption of Supreme Authority with Respect to Germany, Declaration regarding, Berlin, 5th June, 1945, 100
De Juglart, *Répertoire Méthodique de la Jurisprudence Militaire*, 55
Deutsches Militaerstrafgesetzbuch, 58
Director of Public Prosecutions v. *Beard*, 80
Directive regarding Military Commissions in European Theatre of Operations (U.S.), 25th August, 1945, 105 ff.
Directive regarding trial of War Crime Cases (European Theatre) (U.S.), 26th June, 1946, 114 ff.
—, 11th July, 1946, 114 ff.
—, 14th October, 1946, 114 ff.
Dostler Trial, 105, 111
Dreierwalde Case, 22

Essen Lynching Case, 69, 76

France, *Code de Justice Militaire*, Article 10, 42, 43, 94
—, —, Article 65, 43
—, —, Article 66, 98
—, —, Article 68, 49, 50, 97-8
—, —, Article 69, 98
—, —, Article 71, 43
—, —, Article 72, 98
—, —, Article 79, 39
—, —, Article 81, 36, 43, 47, 48, 49
—, —, Article 82, 39, 99
—, —, Article 88, 40, 45, 53
—, —, Article 89, 99
—, —, Article 90, 45, 53, 99
—, —, Article 91, 40, 99
—, —, Article 93, 99
—, —, Article 100, 100
—, —, Article 119, 38, 98
—, —, Article 120, 99
—, —, Article 124, 93
—, —, Article 125, *bis*, 98
—, —, Article 133, 99
—, —, Article 134, 100
—, —, Article 135, 99
—, —, Article 156, 42, 94
—, —, Article 172, 43, 45
—, —, Article 177, 36, 49, 98
—, —, Article 179, 39, 43, 44, 47, 98
—, —, Article 186, 43
—, —, Article 192, 97
—, —, Article 214, 95, 96
—, —, Article 216, 95, 96
—, —, Articles 221 *et seq.*, 95, 96
—, *Code d'Instruction Criminelle*, Articles 407 *et seq.*, 100
—, —, Article 411, 49
—, *Code Pénal*, Article 4, 44-5
—, —, Article 6-8, 97
—, —, Article 35, 51
—, —, Article 59, 94
—, —, Article 60, 49, 94
—, —, Article 75, 46, 47, 49, 51
—, —, Article 77, 46, 47, 49, 51
—, —, Article 92, 52, 95
—, —, Article 114, 51, 54-5
—, —, Article 132, 95, 96
—, —, Articles, 221 *et seq.*, 96
—, —, Articles, 265 *et seq.*, 95, 96
—, —, Article 295, 51, 95, 96
—, —, Article 296, 51, 95
—, —, Article 297, 52
—, —, Article 301, 95
—, —, Article 302, 95, 96, 97
—, —, Article 303, 95, 96
—, —, Article 304, 95, 96, 97
—, —, Article 309-17, 95, 96
—, —, Article 327, 54-5, 96
—, —, Article 332, 95, 96
—, —, Article 334, 95, 96
—, —, Article 341-4, 34, 52, 95, 96
—, —, Article 379, 95, 96
—, —, Article 400, 95, 96
—, —, Article 434-59, 95, 96
—, Decree of 3rd November, 1939, 99, 100
—, Law of 20th April, 1810, 45
—, Law of 29th July, 1881, 46, 47, 52-3
—, Law of 5th October, 1944, 94
—, Ordinance of 28th August, 1944, Concerning the Punishment of War Crimes, 34-5, 38, 44, 45, 46, 48, 51
—, —, Article 1, 38, 43, 44, 45, 47, 48, 50, 52, 93, 94, 95, 96
—, —, Article 2, 52, 95
—, —, Article 3, 96
—, —, Article 4, 94
—, —, Article 5, 42, 54, 94
—, —, Article 6, 93
—, Ordinance No. 20 of 25th November, 1945 (of the Commander-in-Chief in Germany), 100-2
—, Ordinance No. 36 of 25th February, 1946 (of the Commander-in-Chief in Germany), 100-2

Geneva Prisoner of War Convention 1929, 50
—, Article 2, 22, 57, 63, 67
—, Article 3, 63-4
—, Article 5, 67
—, Article 46, 12
—, Article 61, 12
Gluck, *War Criminals, Their Prosecution and Punishment*, 64

Hadamar Trial, 105
Hague Convention No. IV of 1907, 12
—, Article 1, 17, 21-2
—, Article 4, 63-4
—, Article 23(c), 57, 63
—, Article 43, 79

Homma Case, 103, 113
—, International Military Tribunal (and Charter of), 107, 110, 114, 116, 119
—, International Military Tribunal of the Far East, 108

Jaluit Atoll Case, 60, 105

Manual of Military Law, British, 74

Norway, Civil Criminal Code of, Article 12, 83
—, —, Article 13, 83
—, —, Article 62, 2, 10, 13, 82, 88, 89
—, —, Article 228, 1, 2, 4, 5, 10, 13, 15, 20, 82
—, —, Article 229, 1, 2, 4, 5, 10, 12, 15, 20, 82
—, —, Article 231, 15, 20
—, —, Article 232, 1, 10, 12, 13, 15, 20
—, —, Article 233, 15, 20, 84
—, —, Article 267, 85
—, —, Article 268, 85
—, —, Chapters 19, 21 and 22, 2, 8, 20, 89
—, —, Chapter 25, 89
—, Constitution of, Article 17, 81
—, —, Article 20, 92
—, —, Article 96, 3, 6, 8, 10, 11, 82
—, —, Article 97, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14, 82
—, General Law No. 5 of 1st July, 1887, on Criminal Procedure, 86, 87
—, —, Article 99, 87
—, —, Articles 99-101, 88
—, —, Article 107, 88
—, —, Article 110, 88
—, —, Article 185, 88
—, —, Article 329, 88
—, —, Article 331, 88
—, —, Article 338, 88
—, —, Article 380, 90
—, —, Article 382-5, 90, 91
—, —, Article 387, 90
—, —, Article 392, 91
—, —, Article 396, 91
—, —, Article 397, 91
—, —, Article 401, 91
—, —, Article 413, 91
—, —, Article 414, 91
—, —, Article 415, 92
—, —, Article 418, 92
—, —, Article 421, 92
—, —, Article 473, 92
—, Law No. 5 of 13th August, 1915, 86, 87
—, Law No. 2 of 25th June, 1926, 2, 86
—, Law No. 9 of 9th June, 1939, 86
—, Law of 6th July, 1945, 15
—, Law No. 14 of 13th December, 1946, 81
—, —, Article 1, 82, 83
—, —, Article 2, 84
—, —, Article 3, 86, 89
—, —, Article 4, 85
—, —, Article 5, 85
—, —, Article 6, 86
—, Law No. 2 of 21st February, 1947, 81, 87
—, —, Article 1(d), 87
—, —, Article 29, 85
—, —, Article 30, 85, 92
—, —, Article 32, 86
—, —, Article 36, 88
—, —, Article 39, 90
—, —, Article 40, 91
—, —, Article 43, 90
—, —, Article 44, 90
—, —, Article 51, 92
—, Law No. 8 of 19th June, 1947, 86, 90
—, Provisional Decree of 3rd October, 1941, 10
—, Provisional Decrees of 1942, 2, 4, 7, 8
—, Provisional Decree of 4th May, 1945, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 81, 82 (and see Law No. 14 of 13th December, 1946)
—, —, Article 1, 1, 10
—, —, Article 3, 1, 6, 9, 15, 20
—, —, Article 5, 6, 14, 18

Oppenheim-Lauterpacht *International Law*, 21, 58, 79
Ordinance No. 7 of the Military Government of the U.S. Zone of Germany, 114 ff.

Peleus Trial, 111
Pleas: Alleged loss of civilian status by victim, 77-9
—: Drunkenness, 77-80
—: Legitimate Reprisals, 17, 19, 21
—: Madness, 61
—: Military Necessity, 58
—: Provocation, 77-80
—: Self-defence, 77, 79
—: Superior Orders and Duress, 6, 18, 19, 22, 38, 42, 47, 54, 58, 64, 77
—: To the jurisdiction, 36, 47
Procedure and Evidence, matters of, 62-3, 65-6, 70-5, 87, 88, 97-9, 108-11, 117-19

Quirin, Ex Parte, 103, 105, 113

Karl Rauer and Six Others, Trial of, 74
Regulations for the Trial of War Crimes in the Mediterranean Theatre of Operations, 23rd September, 1945 (U.S.), 105 ff.
Regulations governing the Trial of War Criminals in the Pacific Theatre of Operations, 24th September, 1945 (U.S.), 105 ff.
—, 5th December, 1945, 105 ff.
Regulations governing the Trial of War Criminals in the China Theatre of Operations, 21st January, 1946 (U.S.), 105 ff.
Hans Renoth and Three Others, Trial of, 72

Rex v. *Bottril*, ex parte *Küchenmeister*, 50
Rex v. *Lesbini*, 80
Royal Warrant British (Army Order 81/1945), 82, 95, 104
—, Article 3, 72
—, Article 8 (i), 70-1
—, Article 8 (ii), 68-70
Rules of Procedure (British Order in Council, S.R. & O. 1926, No. 989), 72-4, 78-9
Rules of Procedure, etc. (U.S. Pacific Theatre), 5th February, 1946, 109

Eberhard Schöngrath and Six Others, Trial of, 71

Scuttled U-Boats Case, 77
Stephen, *Digest of Criminal Law*, 60
Supreme Allied Commander, Ordinance No. 1 of, 100
—, Ordinance No. 2 of, 100-1, 114,115

Underground movement, legal status of, 17, 19, 21

War Crimes, complicity in, 68-9
War Crimes, types of: abuse of legal process in occupied territories, 23
—, —, deportation of civilians, 23
—, —, ill-treatment of prisoners of war, 67
—, —, killing of civilians, 76
—, —, killing of prisoners of war, 23, 56, 60, 62, 65
—, —, torturing and ill-treatment of civilians, 1, 15
—, —, unlawful recruitment by occupying power, 23
War-time, legal meaning of, 50
Wharton, *Criminal Law*, 60
Yamashita Trial, 50, 103, 105, 112, 113

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